

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



\_\_\_\_\_  
**In the Matter of** )

**Cabell Huntington Hospital, Inc.,** )  
**a corporation:** )

**Pallottine Health Services, Inc.** )  
**a corporation;** )

**and** )

**St. Mary's Medical Center, Inc.** )  
**a corporation;** )  
\_\_\_\_\_

Docket No. 9360

**RESPONDENTS' MEMORANDUM IN OPPOSITION TO COMPLAINT COUNSEL'S  
MOTION TO RETAIN A WITNESS ON COMPLAINT COUNSEL'S FINAL WITNESS  
LIST**

Respondents Cabell Huntington Hospital, Inc. ("Cabell") and St. Mary's Medical Center, Inc. (collectively, "Respondents") respectfully submit this memorandum in opposition to Complaint Counsel's Motion to Retain a Witness on Complaint Counsel's Final Witness List ("Motion"). Good cause does not exist to permit Complaint Counsel to add Mr. Farley Reardon to their Final Proposed Witness List because it was Complaint Counsel's lack of diligence in timely investigating Mr. Reardon that necessitated their Motion. Complaint Counsel failed to include him on their Revised Preliminary Witness List. And Complaint Counsel did not raise adding Mr. Reardon to their Final Proposed Witness List until after the close of discovery, despite knowing the witness they did identify lacked sufficient knowledge. Thus, this Court should deny Complaint Counsel's Motion and strike Mr. Reardon from Complaint Counsel's Final Proposed Witness List.

**FACTUAL BACKGROUND**

On December 11, 2015, Complaint Counsel served their Preliminary Witness List, which included over 165 witnesses, including three LifePoint individuals: (1) Paul Gilbert; (2) Leif Murphy; and (3) Farley Reardon. *See* Motion at 1; *see also* **Ex. A** at 13. Due to the compressed discovery timeline, the parties agreed to pare down their witness lists, *see* **Ex. B** at 1, and agreed that no “new witnesses” would be added absent a showing of “good cause” or “by agreement of the parties.” *Id.* at 2. To make discovery manageable, the parties understood that only individuals appearing on the revised witness lists would be deposed. The revised witness lists were exchanged before the January 6, 2016, deadline for service of discovery requests and subpoenas *duces tecum*. *See* **Ex. E** at 1. On December 29, 2015, Complaint Counsel removed Mr. Reardon from their Revised Preliminary Witness List—leaving Mr. Gilbert as the only witness for LifePoint. *See id.* at 3.

**Redacted**

*See* **Ex. C**.

Complaint Counsel did not convey this information to Respondents. On January 6, 2016, in continued reliance upon Complaint Counsel’s Revised Preliminary Witness List, Cabell served a subpoena *duces tecum* on LifePoint, and subpoenas *ad testificandum* on Mr. Gilbert in his individual capacity and on LifePoint as a corporate entity. Complaint Counsel did the same.

On February 12, 2016, LifePoint’s counsel informed Respondents *for the first time* what Complaint Counsel had known since August 2015, namely that Mr. Gilbert had “minimal” knowledge of, and involvement with, the topics identified in the subpoenas. *See* **Ex. D** (reiterating that Mr. Gilbert “ha[d] nothing to say”).

Meanwhile, Respondents pressed LifePoint to provide a knowledgeable corporate designee. On February 6, 2016, LifePoint finally identified Mr. Reardon and other individuals

who *might* be able to address *some* topics on the corporate subpoena. **Ex. G.** But even then, LifePoint only offered Mr. Reardon as a corporate designee on a very limited number of topics in the subpoena. *See id.* Even after Respondents narrowed the subpoena topics, LifePoint failed to come forward with a witness that could address even the narrowed topics in Respondents’ corporate subpoena. No depositions of LifePoint witnesses have occurred to date. *See* Respondents’ Mot. to Strike at 3–4.

Now, Complaint Counsel seeks to add Mr. Reardon to their Final Proposed Witness list, even though he was not on Complaint Counsel’s Revised Preliminary Witness List, and even though Complaint Counsel knew since August 2015 that the LifePoint witness on its Revised Preliminary Witness List, Mr. Gilbert, lacked knowledge of the relevant issues.

### ARGUMENT

Complaint Counsel bears the burden of demonstrating good cause for their untimely designation of Mr. Reardon. As discussed below, Complaint Counsel cannot do so.

#### **I. Complaint Counsel Has Not Shown Good Cause For Mr. Reardon’s Late Designation.**

Complaint Counsel cannot add Mr. Reardon to their Final Proposed Witness List, in violation of Paragraph 15 of this Court’s Scheduling Order, because Respondents have not agreed to the addition and good cause does not exist that would otherwise justify Mr. Reardon’s inclusion on the Final Proposed Witness List. *See Ex. E* at 8 (stating that the Final Proposed Witness List “may not include additional witnesses not listed in the preliminary witness lists previously exchanged *unless by consent of all parties, or . . . by an order of the [Court] upon a showing of good cause*”) (emphasis added).

The parties agree that good cause may only be found where “a party seeking to extend a deadline demonstrates that a deadline cannot reasonably be met *despite the diligence of the party*

*seeking the extension.*” *In re Chicago Bridge & Iron Co., N.V.*, Dkt. 9300, 2002 FTC LEXIS 69, at \*2 (Oct. 23, 2002) (citing *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998)) (emphasis added). Indeed, “[i]f a party is not diligent, the [good cause] inquiry should end.” *Sosa*, 133 F.3d at 1418 (quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992)). There can be no question that the good cause inquiry turns on the diligence of the *party seeking the extension*. What is more, “prejudice to the party opposing the modification [of the scheduling order] might supply additional reasons to deny a motion.” *Johnson*, 975 F.2d at 609.

Here, Complaint Counsel argues that good cause exists because they included Mr. Reardon on their *original* Preliminary Witness List, which they incorrectly assert “justifies” Mr. Reardon’s inclusion on their Final Proposed Witness List. *See* Motion at 4–5. This argument overlooks the purpose and effect of the parties’ agreement to submit Revised Preliminary Witness Lists, which superseded the parties’ original witness lists.

Given the compressed discovery timeline, the parties agreed to reduce the number of witnesses included on their witness lists. *See* **Ex. B**. Critically, they also agreed that no “new witnesses” would be added to the Revised Preliminary Witness Lists absent a showing of “good cause” or “by agreement of the parties.” **Ex. B** at 2. Respondents have not consented to the addition of Mr. Reardon, therefore Complaint Counsel must demonstrate good cause for Mr. Reardon’s late designation.

If Complaint Counsel *had* acted diligently, they would have timely designated Mr. Reardon; they did not, and their effort to rely on Respondents’ efforts to notice their own depositions of LifePoint representatives cannot excuse that failure.

**A. Complaint Counsel learned of Mr. Gilbert’s lack of knowledge in August, and failed to act diligently to timely designate an appropriate LifePoint witness.**

Redacted

Ex.

**C. Redacted**

*Id.*

Despite learning that Mr. Gilbert lacked knowledge of the relevant issues more than three months earlier, Complaint Counsel still designated Mr. Gilbert on their Preliminary Witness List. To make matters worse, when Complaint Counsel submitted their Revised Preliminary Witness List, instead of removing Mr. Gilbert—whom they knew lacked personal knowledge—they affirmatively chose to remove Mr. Reardon, a decision apparently made without investigating whether he was a suitable witness.

Had Complaint Counsel acted diligently, upon learning that Mr. Gilbert lacked relevant knowledge, they would have used the intervening three months to identify an appropriate LifePoint witness before submitting their Preliminary Witness List on December 11—let alone by the time they agreed to submit their Revised Preliminary Witness List on December 29. Or, they could have retained Mr. Reardon on their Revised Preliminary Witness List, rather than removing him from it. Either way, Complaint Counsel knew as early as August 2015 that the witness they did retain, Mr. Gilbert, would not serve their purposes. Complaint Counsel now claim that good cause justifies the inclusion of Mr. Reardon on their Final Proposed Witness List, but their lack of diligence compels the opposite conclusion.

**B. Respondents did not prevent Complaint Counsel from timely designating Mr. Reardon.**

Respondents played no role in Complaint Counsel’s delay in learning that Mr. Reardon is, according to LifePoint, a more knowledgeable witness than Mr. Gilbert. And “[s]imply claiming that the importance of [Mr. Reardon] was learned late in the discovery process does not satisfy the ‘good cause’ standard since diligence is required in pursuing discovery.” *See In re Chicago Bridge & Iron Co., N.V.*, Dkt. 9300, 2002 FTC LEXIS 69, at \*8 (Oct. 23, 2002). The Court’s order in *In re Chicago Bridge & Iron* is instructive.<sup>1</sup> Respondents moved to strike three witnesses from Complaint Counsel’s witness list due to their belated designations. Complaint Counsel opposed the motion, arguing that they learned of each individual’s importance only after the scheduling order required their designation. *Id.* at \*6. The Court granted respondents’ motion to strike two of the witnesses because their late designation was not attributable to respondents and Complaint Counsel had failed to otherwise demonstrate “sufficient diligence to show good cause.” *Id.* at \*8–9.

Similarly, Complaint Counsel, not Respondents,<sup>2</sup> are responsible for the investigation and strategy motivating their decision to remove Mr. Reardon from their Revised Preliminary Witness List, which they attempt to undo here. Complaint Counsel knew of Mr. Reardon’s existence when they submitted their Preliminary Witness List, as well as when they intentionally

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<sup>1</sup> Complaint Counsel cites this opinion in support of its contention that any prejudice resulting from Mr. Reardon’s late designation “is caused by Respondents [sic] own delay.” *See* Motion at 6. However, *In re Chicago Bridge & Iron Co.* stands for a different proposition—that good cause justifying a late designation *may* be demonstrated if the opposing party prevented that witness’ timely designation. *See In re Chicago Bridge & Iron Co.*, Dkt. 9300, at \*8.

<sup>2</sup> Complaint Counsel try to lay the blame on Respondents because LifePoint had “given Mr. Reardon’s name to Respondent’s counsel on February 6.” Motion at 2. Not only does that misrepresent the substance of that communication, *see Exs. G & H*, but it also improperly places the burden of pursuing Complaint Counsel’s discovery on Respondents.

removed him from their Revised Preliminary List. Complaint Counsel had an affirmative duty to pursue discovery diligently. *Id.* at \*8. If their diligent efforts could not resolve the uncertainty as to which LifePoint witness would suit their needs, Complaint Counsel could and should have retained both Mr. Reardon and Mr. Gilbert on their Revised Preliminary Witness List.

Complaint Counsel now ask for a “do over”; seeking to swap Mr. Gilbert for Mr. Reardon, contrary to the parties’ agreement that no “new witnesses” would be added to a Revised Preliminary Witness List without consent or good cause. While Complaint Counsel attempt to minimize the effect this last minute switch would have on Respondents by stating that he is available for deposition (which is not the case, as discussed below), Respondents should not be required to engage in time consuming, belated discovery merely weeks before trial because Complaint Counsel made a series of inexcusable errors.

## **II. Permitting Complaint Counsel To Retain Mr. Reardon On Its Final Proposed Witness List Would Prejudice Respondents.**

Because Complaint Counsel has not established good cause, the Court need not even address Respondents’ prejudice. *See Johnson*, 975 F.2d at 609 (“If [the party seeking to modify the scheduling order] was not diligent, the inquiry should end.”). Nevertheless, “prejudice to the party opposing the modification might supply *additional* reasons to deny a motion . . . .” *Id.* (emphasis added).

Complaint Counsel’s efforts to show that Respondents could easily depose Mr. Reardon now, and have not pursued offers to do so, lack factual basis and underscore the fact that Respondents are prejudiced by the late designation. In fact, Respondents continually pressed LifePoint to designate a corporate representative, *see Ex. F*, and it was not until early February that LifePoint finally identified Mr. Reardon (as well as another LifePoint employee) as being someone who *might* be able to address *some* of the topics in the corporate subpoena. *See Ex. G.*

Even then, however, LifePoint insisted Mr. Reardon could only testify fully on three of the subpoena topics and could offer very limited testimony on two others. *See Ex. I.* LifePoint would not agree to produce additional witnesses for the remaining set of topics. *See Exs. D & H.* Although Complaint Counsel expressed their own willingness to go forward with Mr. Reardon’s deposition—itsself not surprising since Mr. Reardon was Complaint Counsel’s witness—doing so on the proposed dates would have prejudiced Respondents due to (a) the lack of agreement on the deposition topics, and (b) substantial and delayed document productions by LifePoint—thwarting Respondents’ ability to adequately prepare for any such deposition.<sup>3</sup> In fact, LifePoint has never agreed to produce a witness to address many of the topics in Respondents’ corporate subpoena, even after Respondents agreed to narrow them to facilitate progress on this issue. For these reasons, no depositions have been taken of LifePoint witnesses.

Ultimately, Complaint Counsel’s “willingness” to replace Mr. Gilbert with Mr. Reardon on their Final Proposed Witness List is not a concession. Rather, Complaint Counsel simply seek to replace a witness that they have known since August should *not* be on their witness list with a late-designated witness they could have identified with any degree of diligence from the beginning.

### CONCLUSION

Respondents respectfully request that the Court deny Complaint Counsel’s Motion and preclude Mr. Reardon from testifying at trial.

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<sup>3</sup> Complaint Counsel weakly attests that LifePoint provided some documents, *see* Motion at 6, but that is beside the point. A partial document production and a witness who can testify only as to some of the noticed topics is hardly a full and fair opportunity to take discovery from LifePoint.



Dated: March 21, 2016

Respectfully submitted,

*/s/ Geoffrey S. Irwin*

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*/s/ David W. Simon*

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Pallottine Health Services, Inc.  
and St. Mary's Medical Center, Inc.*

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

In the Matter of	)	
Cabell Huntington Hospital, Inc.,	)	
a corporation;	)	Docket No. 9366
Pallottine Health Services, Inc.	)	
a corporation;	)	
and	)	
St. Mary’s Medical Center, Inc.	)	
a corporation;	)	
	)	
	)	

**[PROPOSED] ORDER ON COMPLAINT COUNSEL’S MOTION TO RETAIN A  
WITNESS ON COMPLAINT COUNSEL’S FINAL WITNESS LIST**

On March 11, 2016, Complaint Counsel filed a motion to retain a certain witness on its Final Proposed Witness List, Mr. Farley Reardon.

Complaint Counsel’s motion is **DENIED**.

ORDERED:

\_\_\_\_\_  
D. Michael Chappell

Chief Administrative Law Judge

Date:

**CERTIFICATE OF SERVICE**

I hereby certify that on March 21, 2016, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing documents to:

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W., Rm. H-110  
Washington, D.C. 20580-0001

Thomas H. Brock  
Alexis Gilman  
Tara Reinhart  
Mark D. Seidman  
Michelle Yost  
Elizabeth C. Arens  
Jeanine Balbach  
Stephanie R. Cummings  
Melissa Davenport  
Svetlana S. Gans  
Elisa Kantor  
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*Counsel for the Federal Trade Commission*

*/s/ Geoffrey S. Irwin*

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*Counsel for Respondent  
Cabell Huntington Hospital, Inc.*

# EXHIBIT A

# Redacted



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# EXHIBIT B

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# EXHIBIT C

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# EXHIBIT D

**Melissa Eakle Leasure**

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**From:** Gilman, Alexis <agilman@ftc.gov>  
**Sent:** Saturday, February 13, 2016 2:55 PM  
**To:** Robert.McCann@dbr.com; 'mel@bcyon.com'  
**Cc:** Sheinberg, Samuel I.  
**Subject:** RE: CHH-SMMC - Subpoena to LifePoint

Rob,

As we have discussed, Complaint Counsel's request with respect to Lifepoint is focused, and it sounds like Mr. Reardon may be the appropriate person to address those issues. If Respondent's don't object, Complaint Counsel is willing to take Mr. Gilbert off our witness list and replace him with Mr. Reardon, and then we can all move forward with the deposition of just Mr. Reardon as a 30b6 (or however Respondents want to proceed with the Lifepoint witness). We believe this approach imposes the least burden on everyone, without prejudice to anyone. Based on your representation about what Mr. Reardon can testify to in a deposition, we don't need to depose Mr. Gilbert *and* Mr. Reardon, as long as we have the ability to call Mr. Reardon at trial, if necessary. There is no Lifepoint declaration as far as I know, so there shouldn't be a third person who needs to be deposed as far as Complaint Counsel is concerned. If Respondents agree with the above, we can move forward to scheduling a single deposition for Mr. Reardon.

Regards,

Alexis

400 7<sup>th</sup> Street, SW | Washington, DC 20580 | 202.326.2579 (direct) | 202.326.2655 (fax) | [agilman@ftc.gov](mailto:agilman@ftc.gov)

---

**From:** "McCann, Robert W" <[Robert.McCann@dbr.com](mailto:Robert.McCann@dbr.com)>  
**Subject:** CHH-SMMC - Subpoena to LifePoint  
**Date:** 12 February 2016 22:31  
**To:** "Sheinberg, Samuel I." <[SSHEINBERG@ftc.gov](mailto:SSHEINBERG@ftc.gov)>, "Melissa Eakle Leasure ([mel@bcyon.com](mailto:mel@bcyon.com))" <[mel@bcyon.com](mailto:mel@bcyon.com)>

Sam and Melissa,

The FTC has subpoenaed Paul Gilbert and, I am informed, put Mr. Gilbert on its witness list for trial. As we have discussed, Mr. Gilbert has had minimal involvement with and has minimal knowledge of, the Huntington matter. LifePoint has proposed to produce a witness (Mr. Farley Reardon) who was principally responsible for LifePoint's response to the SMMC RFP and LifePoint's associated due diligence review. More specifically, Mr. Reardon could speak to Specification 2 of the Subpoena (but only insofar as it concerns business strategy), Specification 9, and Specification 7 (but only to the extent of documents relating to Specifications 2 (as limited) and 9). My understanding from our previous conversation is that someone with Mr. Reardon's knowledge would be acceptable to the FTC in place of Mr. Gilbert.

Melissa has advised that the respondents nonetheless intend to depose Mr. Gilbert so long as Mr. Gilbert is listed as a potential witness and that they want a 30(b)(6) witness in addition. As I have explained to Melissa, LifePoint's hospitals either are on the very fringes of, or outside of, the Relevant Area defined in the subpoena. LifePoint's corporate knowledge of competition in the Huntington, WV area exists primarily because of its participation in the SMMC RFP process (and whatever it knows locally at the fringes of the market). To that point, LifePoint is willing to make Mr.

Reardon available for deposition. Beyond that, we assert that the subpoena to LifePoint for testimony will be an undue burden on a disinterested third party.

The FTC and the respondents need to work this out. If you want Mr. Reardon, we'll produce Mr. Reardon. If you want Mr. Gilbert, we'll produce Mr. Gilbert. (If you want the original declarant, we'll produce him.) But we're not producing all three (or, as I have explained to Melissa, the additional 5 or 6 people it would take to fully respond to the respondents' 30(b)(6) specifications). LifePoint intends to take no further action to respond to the subpoena until we receive a reasonable request for deposition testimony from the FTC and the respondents.

And if the respondents want to (for the third time) threaten a motion to compel, I am more than happy to explain this to a judge.

Robert W. McCann  
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\*\*\*\*\*

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**Melissa Eakle Leasure**

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**From:** McCann, Robert W <Robert.McCann@dbi.com>  
**Sent:** Friday, February 19, 2016 8:10 PM  
**To:** Melissa Eakle Leasure  
**Subject:** RE: LifePoint Subpoena

Thank you for your lengthy letter. You appear to be writing your memorandum in support of a motion to compel.

The fact is I have heard nothing from you on the subject of depositions since February 12, one week ago. Accordingly, I had assumed this was no longer a matter of urgency.

In our first telephone conversation, you expressly indicated that LifePoint would not need to provide a witness for all of the 30(b)96 specifications. I asked you then and subsequently to state what you want in light of the facts I provided and (later) the documents provided by LifePoint. You have never done so.

If you want LifePoint to produce Gilbert, we will do so, but I have already told you that he has nothing to say. It will be a short deposition. By the way, I do not intend to fight your battles with the FTC. You work it out with them.

I explained that a full 30(b)(6) deposition would (based on the interplay of your wide-ranging specifications and LifePoint's national scope and corporate structure) require the testimony of a large number of witnesses. You never asked for any discussion of these circumstances. More tellingly, you have never asked to interview my client, which I would have expected from any experienced counsel. Instead, you continually threaten motions to compel compliance with formal process. In 35 years of practice, I have never had much luck getting tough with third party witnesses. It just doesn't make sense to threaten someone whose cooperation you seek.

I suggest that you consider a series of telephone interviews, in which you may ask designated LifePoint representatives any questions you wish. And then you can decide what -- if anything -- you think you need to get on the record in a time-limited deposition. If you had done this at the beginning, instead of insisting on full compliance with formal process, I expect we would have been done by now.

You also should ask yourself how much effort you want to expend on a fringe competitor that has really nothing to say in this case.

---

**From:** Melissa Eakle Leasure [<mailto:mel@bcyon.com>]  
**Sent:** Friday, February 19, 2016 5:31 PM  
**To:** McCann, Robert W  
**Subject:** LifePoint Subpoena

Please see attached correspondence.

Melissa

Melissa Eakle Leasure, Esquire  
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P. O. Box 1926  
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***Bailes, Craig & Yon, PLLC***

James R. Bailes  
 Thomas L. Craig  
 Daniel T Yon<sup>1,2</sup>  
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February 19, 2016

Via Electronic Transmission  
 Robert.McCann@dbr.com

Robert W. McCann, Esq.

Rob,

I write on behalf of Cabell Huntington Hospital, Inc. ("Cabell") to respond to your email dated February 12, 2016. In that correspondence, you claimed that Cabell has "threatened" to file a motion with the Court seeking an order to compel Lifepoint to produce documents and testimony in compliance with the subpoenas Cabell properly served upon LifePoint. To be clear, I have been forced to suggest that a motion to compel may be necessary in order to protect Cabell's interests in light of LifePoint's significant delays in responding to the subpoenas issued to them in this litigation. Court intervention is not Cabell's preferred resolution to this matter, which is why we are going to great lengths to resolve these issues with you informally.

The FTC, not Cabell, included Paul Gilbert on its revised (and significantly shortened) Preliminary Witness list as of December 29, 2015. In response, Cabell properly issued three subpoenas to Lifepoint: (1) a Subpoena *Duces Tecum* to LifePoint, (2) a Subpoena *Ad Testificandum* to Paul Gilbert, and (3) a Subpoena *Ad Testificandum* to LifePoint for testimony from a corporate representative, including eleven topics for corporate representative testimony. All of the documents and testimony we seek from LifePoint are relevant to issues explicitly raised in the pleadings by the Federal Trade Commission and thus integral to Cabell's defenses. Importantly, these subpoenas were properly served on LifePoint on January 6, 2016, more than a month ago. To date, LifePoint has not fully complied with those subpoenas. The remainder of this letter raises some of the critical outstanding issues related to LifePoint's non-compliance these subpoenas.

*First*, as you know, on February 13, 2016, the FTC sent an email requesting that Farley Reardon, LifePoint's Chief Development Officer, be added to the FTC's witness list, replacing Paul Gilbert, LifePoint's Chief Legal Officer (the subject of Cabell's subpoena). You requested in an email dated February 15, 2016, that I provide a response to this request. Cabell is not amenable to the FTC's proposal to change this witness (or any further witnesses) on their witness

list. Adding a witness at this late date, after the close of fact discovery, and after Cabell has expended significant resources to obtain discovery from LifePoint, would be highly prejudicial to Cabell. The FTC has had more than ample opportunity to identify the correct LifePoint witness, particularly because it investigated this transaction for well over a year prior to bringing its lawsuit, and therefore should not be permitted to replace Mr. Gilbert with another LifePoint employee at this late stage of the litigation. If the FTC now believes that Mr. Gilbert is not able to provide relevant testimony, the FTC should simply remove Mr. Gilbert from the witness list, rather than replace Mr. Gilbert with an individual only identified to Cabell at the close of fact discovery. Swapping out witnesses at this late stage of the proceeding will create the need for additional fact discovery from LifePoint, which Cabell would like to avoid.

*Second*, we have exchanged numerous telephone calls and emails to attempt to facilitate LifePoint's compliance with the subpoenas. Cabell has made every effort—and intends to continue such effort—to limit the burden the subpoenas may impose upon LifePoint, while attempting to extract the basic information it needs to mount a proper defense to the FTC's claims. On or about January 21, 2016, for example, you asked Cabell which categories of documents should be treated with priority. I prioritized the categories of information Cabell needed from LifePoint with the hope of easing LifePoint's production burden. On January 29, 2016 you indicated by email that you had communicated with your client regarding the document requests and that you would follow up that day, which I interpreted to mean that LifePoint would produce some materials in response to the subpoenas. *See* Email from R. McCann to M. Leasure, dated January 29, 2016. However, as of February 4, 2016, five days after indicating that a response was forthcoming, and almost a month after service of the subpoenas, LifePoint had not produced any documents. On February 4, 2016, I again alerted you via email as to the deficiencies of your response to the subpoenas, and stated that a motion to compel might be filed. *See* Email from M. Leasure to R. McCann, dated February 4, 2016. The next day, you indicated a "partial production" was ready. *See* Email from R. McCann to M. Leasure, dated February 5, 2016. Again, due to the significant delay in LifePoint's response to the Subpoena *Duces Tecum*, I reminded you that judicial intervention might be necessary to ensure LifePoint's compliance with the subpoenas if further delays in complying continue.

Similarly, Cabell has attempted on numerous occasions to arrange a date for Mr. Gilbert's deposition, as well as to identify an available deponent in response to the Subpoena *Ad Testificandum* to LifePoint's Corporate Representative. But, to date, LifePoint appears unwilling to cooperate. On February 6, 2016, after my repeated attempts to set deposition dates, you identified Farley Reardon as the corporate representative; however, Mr. Reardon had no knowledge of certain designated topics, including the negotiation of managed care contracts and local operations. *See* Email from R. McCann to M. Leasure, dated February 6, 2016. Further, you indicated that LifePoint wished to limit Mr. Reardon's deposition to four hours. *See id.* Then on February 9, 2016, you offered an additional corporate representative, Robert Klein, Chief Divisional Operating Officer, to testify about local operations. *See* Email from R. McCann to M. Leasure, dated February 9, 2016. Again, you requested that each deposition be limited to a half day. *See id.* I responded on February 9, 2016, requesting further information as to which deposition topics would be covered by Mr. Reardon and Mr. Klein. *See* Email from M. Leasure to R. McCann, dated February 9, 2016. On that same day, you responded noting that "Mr. Klein could testify to Specifications 2, 3, 4, 5, 6, 7 (in part), 10 (maybe), 11 (maybe)" and "Mr. Reardon could testify to Specifications 5, 6, 7 (in part), [and] 9." *See* Email from R. McCann to M. Leasure, dated February 9, 2016. You also noted that you were "unaware of whether either

witness could testify to specifications 1 or 8.” *See id.* You also failed to provide any information regarding the availability of Paul Gilbert (the LifePoint individual on the FTC’s revised preliminary witness list) for a deposition in response to the subpoena Cabell served on him seeking testimony in his individual capacity.

Despite these communications, on February 10, 2016, for the first time, you indicated that LifePoint “does not believe that it can easily or feasibly provide fully responsive testimony on many of the specifications” and that “the testimony of perhaps seven or eight different individuals in multiple locations would be required” to adequately respond to the Subpoena *Ad Testificandum* to LifePoint’s Corporate Representative. *See* Email from R. McCann to M. Leasure, dated February 10, 2016. Further, in contradiction to the designations included just one day prior, you indicated that Mr. Reardon (without mention of Mr. Klein) would be made available for testimony the next week, but would only be designated “to testify concerning Specification 2 (but only insofar as it concerns business strategy), Specification 9, and Specification 7 (but only to the extent of documents relating to Specifications 2 (as limited) and 9).” *See id.* Then, on February 12, 2016, you indicated that LifePoint would not be producing Paul Gilbert as well as the two (2) previously identified potential corporate representatives due to the purported undue burden of responding to these subpoenas in light of LifePoint’s position as a “disinterested third party.” *See* Email from R. McCann to M. Leasure and S. Sheinberg, dated February 12, 2016.

LifePoint has not served any written objections to the subpoenas. As noted above, your email dated February 10, 2016, more than a month after service of the subpoenas, was the first time LifePoint asserted that it would be overly burdensome to respond to the Subpoena *Ad Testificandum* to LifePoint’s Corporate Representative. As such, LifePoint has waived that and any other objection it may have otherwise have raised, pursuant to Commission Rule 3.34(c). Further, if LifePoint is truly a disinterested third party, counsel should ask the FTC to remove LifePoint from its witness list. If Mr. Gilbert is not removed from the FTC witness list, Cabell must be allowed to obtain deposition testimony from Mr. Gilbert in order to allow Cabell to understand Mr. Gilbert’s knowledge regarding this case and any testimony he may give at trial. Moreover, Cabell is entitled to depose a LifePoint corporate representative to understand the basis for the declaration of LifePoint employee Timothy Matney, which he provided in support of the FTC’s challenge to the Cabell/St. Mary’s merger.

It is not our intent to involve LifePoint in this litigation, but because the FTC has identified Mr. Gilbert as a trial witness and obtained a declaration from Mr. Matney, we are forced to seek this discovery.

We look forward to your prompt response, as the deadline for LifePoint’s compliance with the Subpoenas has already long since passed.

Very truly yours



Melissa Hinkle Leasure



# EXHIBIT E

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

\_\_\_\_\_) )  
In the Matter of ) )  
) )  
Cabell Huntington Hospital, Inc. ) ) DOCKET NO. 9366  
a corporation, ) )  
) )  
Pallottine Health Services, Inc. ) )  
a corporation, and ) )  
) )  
St. Mary's Medical Center, Inc. ) )  
a corporation, ) )  
) )  
Respondents. ) )  
\_\_\_\_\_)

**SCHEDULING ORDER**

- December 11, 2015 - Complaint Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
- December 18, 2015 - Respondents' Counsel provides preliminary witness lists (not including experts) with a brief summary of the proposed testimony.
- December 23, 2015 - Complaint Counsel provides expert witness list.
- January 6, 2016 - Deadline for issuing document requests, interrogatories and subpoenas *duces tecum*, except for discovery for purposes of authenticity and admissibility of exhibits.
- January 8, 2016 - Respondents' Counsel provides expert witness list.
- January 29, 2016 - Deadline for issuing requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of exhibits.

- February 10, 2016 - Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
- February 17, 2016 - Deadline for Complaint Counsel to provide expert witness reports.
- February 19, 2016 - Complaint Counsel provides to Respondents' Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Complaint Counsel's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.
- Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
- March 2, 2016 - Deadline for Respondents' Counsel to provide expert witness reports. Respondents' expert report shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).
- March 6, 2016 - Respondents' Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondents' basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.
- Respondents' Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
- March 7, 2016 - Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b). *See* Additional Provision 7.
- March 14, 2016 - Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking

- leave to submit surrebuttal expert reports on behalf of Respondents).
- March 15, 2016 - Deadline for filing motions *in limine* to preclude admission of evidence. *See* Additional Provision 9.
  - March 16, 2016 - Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists.
  - March 17, 2016 - Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
  - March 18, 2016 - Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.
  - March 21, 2016 - Deadline for filing responses to motions *in limine* to preclude admissions of evidence.
  - March 22, 2016 - Complaint Counsel files pretrial brief supported by legal authority.
  - March 22, 2016 - Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
  - March 23, 2016 - Exchange proposed stipulations of law, facts, and authenticity.
  - March 29, 2016 - Respondents' Counsel files pretrial brief supported by legal authority.
  - March 30, 2016 - By 1:00 p.m., file final stipulations of law, facts, and authenticity. Any subsequent stipulations may be offered as agreed by the parties.
  - March 31, 2016 - Final prehearing conference to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits.

To the extent the parties stipulate to certain issues, the parties shall prepare a Joint Exhibit which lists the agreed stipulations.

Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to

the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a Joint Exhibit which lists the exhibits to which neither side objects. Any Joint Exhibit will be signed by each party. (Do not include a signature line for the ALJ.)

April 5, 2016 - Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

### ADDITIONAL PROVISIONS

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Administrative Law Judge by electronic mail to the following email address: [oyalj@ftc.gov](mailto:oyalj@ftc.gov). The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to Office of the Administrative Law Judge directly, and the FTC E-filing system shall not be used for this purpose. The [oyalj@ftc.gov](mailto:oyalj@ftc.gov) email account is to be used only for courtesy copies of pleadings filed with the Office of the Secretary and for documents specifically requested of the parties by the Office of Administrative Law Judges. Certificates of service for any pleading shall not include the OALJ email address, or the email address of any OALJ personnel, including the Chief ALJ, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110 as the place of service. **The subject line of all electronic submissions to [oyalj@ftc.gov](mailto:oyalj@ftc.gov) shall set forth only the docket number and the title of the submission.** The parties are not required to serve a courtesy copy to the OALJ in hard copy, except upon request. In any instance in which a courtesy copy of a pleading for the Administrative Law Judge cannot be effectuated by electronic mail, counsel shall hand deliver a hard copy to the Office of Administrative Law Judges. Discovery requests and discovery responses shall not be submitted to the Office of Administrative Law Judges.

2. The parties shall serve each other by electronic mail and shall include "Docket 9366" in the re: line and all attached documents in .pdf format. Complaint Counsel and Respondents' Counsel agree to waive their rights to Service under 16 C.F.R. § 4.4(a)-(b). In the event that service through electronic mail is not possible, the parties may serve each other through any method authorized under the Commission's Rules of Practice.

3. Each pleading that cites to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for *in camera* treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), or

each motion for sanctions pursuant to § 3.38(b), the required signed statement must also “recite the date, time, and place of each . . . conference between counsel, and the names of all parties participating in each such conference.” Motions that fail to include such separate statement may be denied on that ground.

5. Rule 3.22(c) states:

All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words, and the word count limits of 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the Administrative Law Judge, including those filed under Rule 3.38.

6. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

7. If a party intends to offer confidential materials of an opposing party or non-party as evidence at the hearing, in providing notice to such non-party, the parties are required to inform each non-party of the strict standards for motions for *in camera* treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45, explained in *In re Jerk, LLC*, 2015 FTC LEXIS (Feb. 23, 2015); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); and *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

8. If the expert reports prepared for either party contain confidential information that has been granted *in camera* treatment, the party shall prepare two versions of its expert report(s) in accordance with Additional Provision 6 of this Scheduling Order and 16 C.F.R. § 3.45(e).

9. Motions *in limine* are discouraged. Motion *in limine* refers “to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is

actually offered.” *In re Daniel Chapter One*, 2009 FTC LEXIS 85, \*18-20 (April 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Id.* (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *Sec. Exch. Comm’n v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at \*5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence.

10. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 30 days of service of the responses and/or objections to the discovery requests or within 20 days after the close of discovery, whichever first occurs.

11. Each party is limited to 50 document requests, including all discrete subparts; 25 interrogatories, including all discrete subparts; and 50 requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. Any single interrogatory inquiring as to a request for admissions response may address only a single such response. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Within seven days of service of a document request, the parties shall confer about the format for the production of electronically stored information.

All discovery taken in connection with any related federal action filed by the Federal Trade Commission to temporarily restrain or preliminarily enjoin Respondents’ proposed transaction may be used in this action and vice versa. However, document requests, interrogatories, and requests for admission served by the parties in connection with any related federal action will not count against the limits noted above. Witnesses who are deposed in any related federal action will not be redeposed in this administrative action.

12. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by videotape at least five days in advance of the deposition. No deposition, whether recorded by videotape or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the Administrative Law Judge.

13. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. Additionally:

(a) The parties shall consult with each other prior to confirming any deposition to coordinate the time and place of the deposition. The parties shall use reasonable efforts to reduce the burden on witnesses noticed for depositions and to accommodate the witness’s schedule.

- (b) All third-party depositions shall be limited to a maximum of seven (7) hours.
- (c) For any third-party deposition noticed by both Complaint Counsel and Respondents, where the witness has not submitted a declaration, affidavit, or letter of support for the proposed transaction, the maximum time for the deposition shall be allocated evenly between the two sides.
- (d) For any noticed deposition for which one side has obtained a declaration, affidavit, or letter of support for the proposed acquisition from the deponent, the maximum time shall be allocated for five (5) hours for the party that did not obtain the declaration, affidavit, or letter of support, and two (2) hours for the party that obtained the declaration, affidavit, or letter of support.
- (e) If the third-party witness has submitted a declaration, affidavit, or letter of support to both sides, time shall be allocated evenly between the sides.
- (f) For any third-party witnesses retained by Respondents (e.g., as a consultant, agent, contractor, or representative) in connection with their proposed transaction, unless the parties otherwise agree, the seven hours of deposition time shall be allocated as follows: Complaint Counsel will have the opportunity to use five (5) hours for the deposition and Respondents shall have the opportunity to use two (2) hours for the deposition.
- (g) For party witnesses, Complaint Counsel will have the opportunity to use seven (7) hours for the deposition. Complaint Counsel may depose any Respondent witness, including those for whom the FTC conducted an investigational hearing.
- (h) Unused time in any party's allocation of deposition time shall not transfer to the other party.
- (i) If a party serves a subpoena on a third party for the production of documents or electronically stored information and a subpoena commanding attendance at a deposition, the deposition date must be at least seven (7) days after the original return date for the document subpoena.

14. Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within three business days of receiving the documents. No deposition of a non-party shall be scheduled between the time a non-party provides documents in response to a subpoena *duces tecum* to a party, and 3 days after the party provides those documents to the other party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition, as agreed to by all parties involved.

15. The final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of



discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary witness lists previously exchanged unless by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

16. The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

17. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

18. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

19. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other party:

(i) materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.

(b) At the time an expert report is produced, the producing party shall provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of 19(g).

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the Administrative Law Judge, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert report shall include a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the expert in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who is not designated by a party as a testifying witness.

(f) At the time of service of the expert reports, a party shall provide opposing counsel:

(i) a list of all commercially-available computer programs used by the expert in the preparation of the report;

(ii) a copy of all data sets used by the expert, in native file format and processed data file format; and

(iii) all customized computer programs used by the expert in the preparation of the report or necessary to replicate the findings on which the expert report is based.

(g) Experts' disclosures and reports shall comply in all respects with Rule 3.31A, except that neither side must preserve or disclose:

(i) any form of communication or work product shared between any of the parties' counsel and their expert(s), or between any of the experts themselves;

(ii) any form of communication or work product shared between an expert(s) and persons assisting the expert(s);

(iii) expert's notes, unless they constitute the only record of a fact or an assumption relied upon by the expert in formulating an opinion in this case;

(iv) drafts of expert reports, analyses, or other work product; or

(v) data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in the opinions contained in his or her final report.

20. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the Administrative Law Judge.

21. The parties shall provide one another, and the Administrative Law Judge, no later than 48 hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of hearing, subject to possible delays or other unforeseen circumstances.

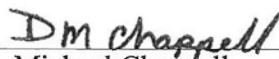
22. The parties shall provide one another with copies of any demonstrative, illustrative or summary exhibits (other than those prepared for cross-examination) 24 hours before they are used with a witness.

23. Complaint Counsel's exhibits shall bear the designation PX and Respondents' exhibits shall bear the designation DX or some other appropriate designation. Complaint

Counsel's demonstrative exhibits shall bear the designation PXD and Respondents' demonstrative exhibits shall bear the designation DXD or some other appropriate designation. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number. Additionally, parties must account for all their respective exhibit numbers. Any number not actually used at the hearing shall be designated "intentionally not used."

24. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. The parties shall confer and shall eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. For example, if PX 100 and DX 200 are different copies of the same document, only one of those documents shall be offered into evidence. In addition, the parties shall confer in advance of the final prehearing conference to prepare a Joint Stipulation that lists the proposed exhibits to which neither party has an objection to admissibility. Additional exhibits may be added after the final prehearing conference only by order of the Administrative Law Judge upon a showing of good cause. Counsel shall contact the court reporter regarding submission of exhibits.

ORDERED:

  
\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date: December 4, 2015

# EXHIBIT F

**Melissa Eakle Leasure**

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**From:** Melissa Eakle Leasure <mel@bcyon.com>  
**Sent:** Friday, February 05, 2016 8:44 AM  
**To:** McCann, Robert W  
**Subject:** Re: LifePoint Subpoena

I will send you the FTP site information shortly. Can you please provide me with dates that your client is available for deposition?

Sent from my iPhone

On Feb 5, 2016, at 8:30 AM, McCann, Robert W <[Robert.McCann@dbf.com](mailto:Robert.McCann@dbf.com)> wrote:

I have a partial production for you as soon as I can arrange a secure file transfer. Do you have an FTP site? The client continues to review internal documents and has indicated that they will be sent as soon as possible. However, if you intend to file a motion to compel, I can await your motion and then respond.

---

**From:** Melissa Eakle Leasure [<mailto:mel@bcyon.com>]  
**Sent:** Thursday, February 04, 2016 7:20 PM  
**To:** McCann, Robert W  
**Subject:** Re: LifePoint Subpoena

Mr. McCann

I have not received any documents from your client responsive to the subpoena nor have a received dates your client is available for deposition. Please be advised that I intend to file a Motion to Compel by end of day tomorrow.

Melissa

**From:** "McCann, Robert W" <[Robert.McCann@dbf.com](mailto:Robert.McCann@dbf.com)>  
**To:** Melissa Eakle Leasure <[mel@bcyon.com](mailto:mel@bcyon.com)>  
**Sent:** 1/29/2016 10:30 AM  
**Subject:** RE: LifePoint Subpoena

Melissa,

I have teed up the requests with my client and am awaiting further information. I will follow up today.

---

**From:** Melissa Eakle Leasure [<mailto:mel@bcyon.com>]  
**Sent:** Thursday, January 28, 2016 9:42 PM  
**To:** McCann, Robert W  
**Subject:** LifePoint Subpoena

Mr. McCann,

We spoke yesterday via telephone regarding the outstanding subpoena served on

LifePoint. To date, Lifepoint has not responded to the subpoena despite the fact that a response was required by January 18, 2016.

During our call yesterday, you indicated that you were waiting for me to identify priority categories of documents for LifePoint to produce. As I reminded you on the call, we already had that discussion on or about January 21st when I identified the key categories of documents we expected to be produced. During yesterday's call, you also agreed to confer with your client to determine the appropriate corporate designee. Before our call ended, you promised to followup with me by close of business, on Wednesday, January 27th.

To date, I have not received a call from you regarding the corporate designee nor have I received any documents responsive to the subpoena. If I have not received a response from you by 2pm tomorrow, I will be forced to seek the court's assistance in enforcing compliance with the subpoena which has been duly issued and served upon your client. I hope that we can resolve any outstanding issues without needing to involve the Court.

Sincerely,

Melissa Eakle Leasure

Melissa Eakle Leasure, Esquire  
BAILES, CRAIG & YON, PLLC  
P. O. Box 1926  
Huntington, WV 25720-1926  
(304) 697-4700 (phone)  
(304) 697-4714 (fax)

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**Melissa Eakle Leasure**

---

**From:** Melissa Eakle Leasure <mel@bcyon.com>  
**Sent:** Friday, February 05, 2016 9:53 AM  
**To:** Robert.McCann@dbr.com  
**Subject:** Fwd: File Request - LifePoint Subpoena (File Upload Request)

See below. Let me know if you have any problems.  
Melissa

Sent from my iPhone

Begin forwarded message:

**From:** [jpgatchalian@jonesday.com](mailto:jpgatchalian@jonesday.com)  
**Date:** February 5, 2016 at 9:46:19 AM EST  
**To:** [mel@bcyon.com](mailto:mel@bcyon.com)  
**Subject:** File Request - LifePoint Subpoena (File Upload Request)

---

**[jpgatchalian@jonesday.com](mailto:jpgatchalian@jonesday.com) has requested a file from you.**  
Use the link below to send securely.

---

[jpgatchalian@jonesday.com](mailto:jpgatchalian@jonesday.com) has requested a file from you.

**Send Files Securely:**

Please click on the link below to send files back:

<https://jonesday.accellion.net/a/wreq/fCO5R3YvDI08888>

(If clicking the link in this message does not work, copy and paste the link into the address bar of your browser.)

The secure link is valid for 7 days or up to 1 transactions.

Thank you for using Jones Day's Secure File Sharing.

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**Melissa Eakle Leasure**

---

**From:** Melissa Eakle Leasure <mel@bcyon.com>  
**Sent:** Friday, February 05, 2016 4:29 PM  
**To:** 'McCann, Robert W'  
**Subject:** RE: Subpoena to LifePoint

Rob,

I appreciate you getting the limited production today. Can you please provide me today with dates and names for the depositions and also with a date that I can expect to receive the remaining documents from LifePoint? I am afraid we are running out of time. As I believe you are aware, discovery closes in this matter on February 10. I will be forced to file a Motion to Compel to protect the interests of my client if I do not have dates for depositions and the date I can expect the remaining documents from your client before Monday.

Melissa

---

**From:** McCann, Robert W [<mailto:Robert.McCann@dbr.com>]  
**Sent:** Friday, February 05, 2016 2:51 PM  
**To:** Melissa Eakle Leasure ([mel@bcyon.com](mailto:mel@bcyon.com))  
**Subject:** Subpoena to LifePoint

Melissa,

Momentarily, I will upload 22 documents constituting LifePoint's initial production. Because of the relatively small volume, we are producing them in Bates-numbered pdf format in order to avoid unnecessary expense for my client. Please let me know if you have any questions, and I will follow up on the remaining production and deposition questions.

Rob McCann

Robert W. McCann  
**Drinker Biddle & Reath LLP**  
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Washington, DC 20005-1209  
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(202) 842-8465 *fax*  
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# EXHIBIT G

**Melissa Eakle Leasure**

---

**From:** Melissa Eakle Leasure <mel@bcyon.com>  
**Sent:** Wednesday, February 10, 2016 11:45 AM  
**To:** 'McCann, Robert W'  
**Subject:** RE: LifePoint Deponent  
**Attachments:** Updated Attachment A February 10 2016.pdf

Rob,

Although we had previously come to resolution regarding the discrepancy included in Attachment A to the Corporate Representative Subpoena, to ensure clarity of the record, please find attached an amended Attachment A. I have also included the original Subpoena as reference.

We are happy to discuss tailoring the time of the deposition based upon LifePoint's corporate representative designations. However, we cannot provide agreement regarding the length of the subpoena until LifePoint definitively indicates which individuals are to be designated for each corporate representative topic. As soon as you have that information, please let me know. Also, can you please let me know if LifePoint has any further documents which are going to be produced in response to the Subpoena Duces Tecum? We are in the process of reviewing the documents produced yesterday. If further documents are going to be produced, we need to allow for review time when setting the deposition date. Also, please provide me with dates that Mr. Gilbert is available for deposition.

Melissa

---

**From:** McCann, Robert W [mailto:Robert.McCann@dbr.com]  
**Sent:** Tuesday, February 09, 2016 10:50 PM  
**To:** Melissa Eakle Leasure  
**Subject:** RE: LifePoint Deponent

Melissa,

This response is preliminary, informed by my conversations with LifePoint, but subject to confirmation given the ongoing discussions with you regarding the scope of LifePoint's response. There is some overlap in their likely knowledge given the overlap between LifePoint's corporate strategy and it's local implementation.

I believe Mr. Klein could testify to Specifications 2, 3, 4, 5, 6, 7 (in part), 10 (maybe), 11 (maybe)

I believe Mr. Reardon could testify to Specifications 5, 6, 7 (in part), 9

I am unaware of whether either witness could testify to specifications 1 or 8. I note that specification 8 does not, as written, relate to LifePoint.

Rob

---

**From:** Melissa Eakle Leasure [mailto:mel@bcyon.com]  
**Sent:** Tuesday, February 09, 2016 7:08 PM  
**To:** McCann, Robert W  
**Subject:** Re: LifePoint Deponent

Rob:

Thank you for your email identifying the corporate representatives. Can you please identify which witness will testify about the specific topics listed in Attachment A to the Subpoena? Based upon those designations, we will be in a better position to respond to your suggestion on timing.

Thank you in advance.

Melissa

**From:** "McCann, Robert W" <[Robert.McCann@dbr.com](mailto:Robert.McCann@dbr.com)>  
**To:** "Melissa Eakle Leasure ([mel@bcyon.com](mailto:mel@bcyon.com))" <[mel@bcyon.com](mailto:mel@bcyon.com)>  
**Sent:** 2/9/2016 9:51 AM  
**Subject:** RE: LifePoint Deponent

Melissa,

I have not received a response to my email of Saturday.

As an alternative, LifePoint will make two witnesses available, Mr. Reardon and Robert Klein, the divisional Chief Operating Office (with responsibility for WV assets). We would propose that the depositions be taken in Nashville on the same day (split 1/2 day each).

We plan to produce additional documents today.

Rob

---

**From:** McCann, Robert W  
**Sent:** Saturday, February 06, 2016 2:19 PM  
**To:** Melissa Eakle Leasure ([mel@bcyon.com](mailto:mel@bcyon.com))  
**Subject:** LifePoint Deponent

Melissa,

LifePoint has designated Farley Reardon, Vice President, Development. Mr. Reardon's responsibilities lie in the company's merger and acquisition activities. He has held his current position for approximately 8 years. He will be available for deposition in Nashville on Tuesday or Friday of next week (he is traveling on Wednesday and Thursday). He is also available in Nashville the following week. We can arrange a location.

Mr. Reardon will be prepared to answer questions concerning LifePoint's corporate strategy, including its strategy in West Virginia, LifePoint's general experience in collaborative relationships, and LifePoint's participation in the SMMC bid process (for which he had responsibility). Mr. Reardon does not have responsibility for negotiating managed care contracts, and he will be able to provide only limited testimony on this topic. Mr. Reardon also does not have responsibility for the operations of LifePoint's West Virginia hospitals, and he will not be able to provide any testimony regarding local operational decisions.

We request that Mr. Reardon's deposition be limited to 4 hours, which we believe will be adequate to cover the issues to which Mr. Reardon can speak competently.

Thank you.

Robert W. McCann  
**Drinker Biddle & Reath LLP**  
1500 K Street, N.W.

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# EXHIBIT H

**Melissa Eakle Leasure**

---

**From:** Melissa Eakle Leasure <mel@bcyon.com>  
**Sent:** Friday, February 12, 2016 4:47 PM  
**To:** 'McCann, Robert W'  
**Subject:** RE: LifePoint

Rob,

We will take into consideration a modified corporate representative deposition in light of your assertions below. It is not our intent to overburden a disinterested third party. However, the FTC has listed Mr. Paul Gilbert of LifePoint on its witness list for trial. Therefore, we need to take Mr. Gilbert's deposition in his personal capacity as soon as possible. Likewise, we need to take the corporate representative deposition to understand the basis for Mr. Matney's declaration in support of the FTC's challenge of the Cabell/St. Mary's merger and be given the opportunity to test whether Mr. Gilbert's positions are the same as LifePoints. If LifePoint is truly a disinterested party, we are willing to withdraw our subpoenas so long as the FTC removes Mr. Gilbert from their witness list. Additionally, due to the volume of documents produced, I do not think it is realistic that depositions will be conducted next week. I am happy to discuss this with you further.

Melissa

---

**From:** McCann, Robert W [<mailto:Robert.McCann@dbr.com>]  
**Sent:** Wednesday, February 10, 2016 4:26 PM  
**To:** Melissa Eakle Leasure ([mel@bcyon.com](mailto:mel@bcyon.com))  
**Subject:** LifePoint

Melissa,

LifePoint has further considered its ability to provide testimony in response to your subpoena. LifePoint does not believe that it can easily or feasibly provide fully responsive testimony on many of the specifications. As we have discussed, LifePoint is a holding company. Its strategic and major operational decisions for its hospitals are generally a combined process between LifePoint corporate and local hospital management. For example, payor contracting typically involves both the hospital CEO (and/or CFO) and a LifePoint corporate contracting official. To fully respond to the 11 specifications, LifePoint believes that the testimony of perhaps seven or eight different individuals in multiple locations would be required. These are not topics on which an uninvolved corporate official can gain the knowledge required to testify without disrupting his or her normal responsibilities for an extended period of time. We assert this to be an undue burden on a disinterested third party.

LifePoint's hospitals either are on the very fringes of, or outside of, the Relevant Area defined in the subpoena. LifePoint's corporate knowledge of competition in the Huntington, WV area exists primarily because of its participation in the SMMC RFP process (and whatever it knows locally at the fringes of the market). To that point, LifePoint will make Mr. Reardon available for deposition in Nashville next week. As I have indicated previously, Mr. Reardon is responsible for corporate development and was principally responsible for LifePoint's proposal to acquire SMMC, and for the due diligence conducted by LifePoint in that process. We would designate Mr. Reardon to testify concerning Specification 2 (but only insofar as it concerns business strategy), Specification 9, and Specification 7 (but only to the extent of documents relating to Specifications 2 (as limited) and 9).

Mr. Reardon is available in Nashville next week as follows:

Monday 2/15 Available  
 Tuesday 2/16 Available until 4:30p



Wed 2/17	Available
Thu 2/18	Available, subject to rescheduling existing commitments
Fri 2/19	Available after 1:30p only

Please let me know your preference as to scheduling. Thanks.

Rob

Robert W. McCann  
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# EXHIBIT I

**Melissa Eakle Leasure**

---

**From:** Melissa Eakle Leasure <mel@bcyon.com>  
**Sent:** Tuesday, March 01, 2016 3:40 PM  
**To:** 'McCann, Robert W'  
**Subject:** RE: LifePoint Subpoena

Rob:

Thank you for your response. We plan to move to strike Mr. Reardon from the FTC's witness list due to the FTC's late disclosure of Mr. Reardon as a potential witness. To avoid unnecessary cost and burden on LifePoint, we intend to delay any potential deposition of Mr. Reardon until we receive a ruling on that motion. However, we will move forward with deposing Mr. Gilbert. Please let us know his availability for deposition.

Melissa

---

**From:** McCann, Robert W [<mailto:Robert.McCann@dbr.com>]  
**Sent:** Saturday, February 27, 2016 11:18 AM  
**To:** Melissa Eakle Leasure  
**Subject:** RE: LifePoint Subpoena

Melissa,

I have conferred with the client, and we are agreeable to presenting Mr. Reardon as a 30(b)(6) witness under the narrowed topics with the following understandings.

Topic No. 1 – Mr. Reardon can testify on this topic.

Topic No. 2 – Mr. Reardon has knowledge of long-term business strategy. Advertising and marketing are local (hospital-level) responsibilities, not LifePoint corporate responsibilities. Mr. Reardon will use reasonable efforts to gain an understanding of local advertising and marketing strategy, but he will have limited or no knowledge of specific, individual instances of advertising or marketing.

Topic No. 3 – This is well outside of Mr. Reardon's areas of responsibility and it is implausible to think that he can gain enough knowledge to answer the types of questions he would likely be asked in this matter. However, LifePoint is investigating whether or not it has ever negotiated tiered/narrow network contracts in WV or KY. If the answer is no, Mr. Reardon can confirm that in deposition.

Topic No. 4 – Again, this is a topic that implicates both corporate and local responsibilities. Mr. Reardon will use reasonable efforts to gain an understanding of local service and advertising strategies, but he will have limited or no knowledge of specific, individual instances of operating decisions or advertising.

Topic No. 7 – Mr. Reardon can testify on this topic.

Topic No. 8 – Mr. Matney's declaration is a personal declaration and does not purport to speak for the company. Accordingly, it's not actually a proper topic for a 30(b)(6) deposition. Of course, Mr. Reardon can speak to the declarant, and then provide his interpretations of the declarant's understandings, but it's not reasonable to think that Mr. Reardon can speak for the declarant. I'm not sure what value this kind of hearsay would have anyway. I would propose to take this topic off the list for Mr. Reardon.

Topic No. 9 – Mr. Reardon can testify on this topic.

If you want to go ahead with this deposition, this coming week is now infeasible and we suggest that it take place on March 9, which is Mr. Reardon's best available date in the following week. Let me know how you would like to proceed.

Rob

---

**From:** Melissa Eakle Leasure [mailto:mel@bcyon.com]  
**Sent:** Wednesday, February 24, 2016 9:42 PM  
**To:** McCann, Robert W  
**Subject:** LifePoint Subpoena

Rob,

From our conversation today, it is my understanding that LifePoint has a compartmentalized corporate structure which would require numerous witnesses in order to comply with the the Subpoena *Ad Testificandum* to LifePoint's Corporate Representative. I have reviewed the topics included in that Subpoena to determine how we can narrow those topics and, accordingly, the number of witnesses necessary for LifePoint to comply with the subpoena.

We are willing to narrow the topics to: 1 - 4 and 7-9. Regarding Topic No. 3, we are willing to narrow Topic No. 3 to a discussion of LifePoint's negotiations with payors to become an in network provider for the Relevant Services in the Relevant Area for a tiered or other form of narrow network.

Please let me know your thoughts.

Melissa

\*\*\*\*\*

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Notice of Electronic Service

**I hereby certify that on March 21, 2016, I filed an electronic copy of the foregoing Respondents' Memorandum in Opposition to CC's Motion to Retain a Witness (Redacted), with:**

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
Suite 110  
Washington, DC, 20580

Donald Clark  
600 Pennsylvania Ave., NW  
Suite 172  
Washington, DC, 20580

**I hereby certify that on March 21, 2016, I served via E-Service an electronic copy of the foregoing Respondents' Memorandum in Opposition to CC's Motion to Retain a Witness (Redacted), upon:**

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Benjamin Menker  
Attorney