

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



ORIGINAL

Docket No. 9366

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.)

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE WITNESSES FROM COMPLAINT COUNSEL'S WITNESS LIST

Respondents' Motion to Strike four Complaint Counsel witnesses should be denied. Complaint Counsel timely and properly identified these four witnesses on its witness lists, and these witnesses have personal knowledge of relevant, material, reliable, and admissible evidence. In particular, three of the four witnesses that Respondents seek to strike have appeared on Complaint Counsel's Preliminary Witness List (December 11, 2015), its Amended Preliminary Witness List (December 29, 2015), and its Final Witness List (February 19, 2016). The fourth witness appeared on Complaint Counsel's Preliminary Witness List and its Final Witness List, thus entitling him to remain on the Final Witness List pursuant to the clear terms of Provision 15 of this Court's Scheduling Order. There is also good cause to retain the fourth witness because Respondents have repeatedly had the opportunity to schedule a deposition, but repeatedly failed

to do so.¹ If Respondents' motion is granted, Complaint Counsel would be prejudiced in its ability to present its case at trial. By contrast, there is no prejudice to Respondents. To the extent Respondents claim prejudice in their ability to take discovery, it is due to Respondents' own failure to act.

ARGUMENT

Respondents move to strike four witnesses on Complaint Counsel's Final Witness List: Tim Donahoe (Energy Services of America Corporation), Cindy Winings (United HealthCare), and Paul Gilbert and Farley Reardon (LifePoint). Although styled as a motion to strike, Respondents have essentially filed a motion *in limine* seeking to exclude evidence before it is actually offered. Such motions are discouraged under this Court's Scheduling Order.²

Respondents' proposed relief is drastic and unfounded. They seek to strike witnesses (and potentially documents produced by the witnesses, even though Respondents list many documents from these third parties on Respondents' own exhibit list) that have complied with document subpoenas³ and have actually been deposed or been available to be deposed, including:

- A witness that complied with Respondents' document subpoena and, except for being temporarily unavailable due to health issues, has been and is available for deposition;
- A witness that complied with Respondents' document subpoena and sat for a full five-hour deposition; and
- Witnesses that complied with Respondents' document subpoenas and have been available for deposition on several occasions, which Respondents have neglected to confirm and schedule.

¹ See also Complaint Counsel's Motion to Retain a Witness on Complaint Counsel's Final Witness List, filed on March 11, 2016.

² Scheduling Order ¶ 9.

³ Respondents' motion does not complain of any lack of compliance with their subpoenas for documents.

As a result, Respondents' motion should be denied as to each of the four witnesses.

1. Tim Donahoe (Energy Services)

Complaint Counsel timely identified Mr. Donahoe of Energy Services on its Preliminary Witness List, its Amended Preliminary Witness List, and its Final Witness List. Respondents subpoenaed Mr. Donahoe and scheduled the deposition for January 27, 2016. The day before the deposition, Mr. Donahoe had an unforeseen medical issue { }. As soon as Complaint Counsel learned that Mr. Donahoe was healthy enough to be deposed, Complaint Counsel alerted Respondents and confirmed his availability for a deposition on particular dates. *See* Ex. A (confidential exhibit) and Ex. B (confidential exhibit). To our knowledge, Respondents have not sought to reschedule Mr. Donahoe's deposition.

Respondents' arguments do not suffice to strike this witness. Respondents assert that Mr. Donahoe should be precluded from testifying because "Respondents did not have a reasonable opportunity to depose [Mr. Donahoe] during the discovery period." Mot. at 6. But, to our knowledge, at no time since the original January 27 deposition date have Respondents contacted Mr. Donahoe's counsel to ascertain his health or schedule a deposition. Further, in the *In re Jerk* case cited in Respondents' motion, Jerk failed to produce a corporate witness three times and failed to comply with other discovery orders; that is completely inapposite given the facts here. Moreover, there is no prejudice here from taking this deposition after the close of fact discovery. Indeed, several depositions in this case have occurred after February 10, and Respondents have agreed to take the deposition of another witness, Thomas Health, between now and the April 5 trial date. In any case, any delay or prejudice is of Respondents' own doing, for failing to pursue their own propounded discovery requests. *See In re Chicago Bridge & Iron Co.*, 2002 FTC LEXIS 69, *8 (October 23, 2002).

2. Cindy Winings (United)

Complaint Counsel identified Ms. Winings on its Preliminary Witness List, its Amended Preliminary Witness List, and its Final Witness List. Respondents issued subpoenas to a corporate representative of United and Ms. Winings on January 5, 2016. Counsel for United served objections to the corporate representative subpoena on January 19, 2016, objecting to the specifications. Ex. C (confidential exhibit). Nevertheless, on February 11, 2016, Respondents deposed Ms. Winings in her individual capacity and as a corporate representative of United for a full five hours, per the Court's Scheduling Order. Respondents' motion to exclude Ms. Winings fails for several reasons.

First, Ms. Winings obviously is qualified to testify as United's corporate representative and testify in her individual capacity. {

} In addition to testifying based on her personal knowledge, {

}

As such, Ms. Winings has sufficient personal knowledge on the matters at issue. *See U.S. v. Sutton*, 795 F.2d 1040, at 47 (Temp. Emer. Ct. App. 1986), *cert. denied*, 479 U.S. 1030 (1987) (a supervisor had sufficient personal knowledge to testify to the work of his employees); *In re LabMD, Inc.*, 2015 WL 1849042, *3 (April 16, 2015) (denying motion *in limine* because

Respondents failed to show the evidence was clearly inadmissible for all purposes); *see also* Scheduling Order ¶ 9 (“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 the evidence.”). Indeed, Respondents deposed her for the full five hours. If Ms. Winings was unprepared to testify in her corporate capacity or lacked personal knowledge, the deposition would not have lasted that long.

Second, Respondents have provided no support for the contention that Ms. Winings cannot testify at trial in her individual capacity. At most, Respondents’ argument may be relevant in determining the scope or weight of her trial testimony. *Cf. In the Matter of Daniel Chapter One*, 2009 FTC LEXIS 85, 23 (April 20, 2009) (denying motion *in limine* stating expert witness’s insufficient knowledge of issues “addresses the weight, rather than the admissibility” of the opinions). But Respondents cannot argue that Ms. Winings should be excluded from testifying on any matters, much less *all* matters.

Third, if Respondents did not believe Ms. Winings was adequately prepared, they could have—and should have—sought relief from United and this Court. United timely served Respondents with objections regarding the burden of their corporate subpoena, which went unanswered by Respondents. Respondents were free to move to compel United to produce additional witnesses who could testify on behalf of the company on topics that Ms. Winings purportedly could not address. Respondents failed to do so. This is not a legitimate grounds for precluding Complaint Counsel from calling a witness who can testify about issues relevant to the case.

In sum, there is no basis to strike Ms. Winings from Complaint Counsel’s Witness List.

3. Paul Gilbert and Farley Reardon (LifePoint)

Complaint Counsel timely identified Messrs. Gilbert and Reardon on its Preliminary Witness List. After Complaint Counsel submitted its Amended Preliminary Witness List, which listed only Mr. Gilbert, Respondents subpoenaed Mr. Gilbert in his individual capacity and a LifePoint corporate representative. Before the close of discovery, on February 6, 2016, LifePoint's counsel identified Mr. Reardon as the corporate designee.

LifePoint informed Respondents that it would be burdensome to produce several witnesses for a corporate deposition⁴ and it would designate Mr. Reardon to testify on a narrowed set of topics. Complaint Counsel informed Respondents that it would be amenable to substituting Mr. Reardon for Mr. Gilbert, based on LifePoint's representations,⁵ and to decrease the burden to LifePoint, a third-party witness, consistent with the Scheduling Order ¶ 13(a) ("The parties shall use reasonable efforts to reduce the burden on witnesses noticed for depositions and to accommodate the witness's schedule"). Because this issue remained unresolved, however, Complaint Counsel listed both Messrs. Gilbert and Reardon on its Final Witness List.

Respondents move to exclude both Messrs. Gilbert and Reardon from Complaint Counsel's witness list because they have not deposed them. Respondents, however, failed to schedule Mr. Gilbert's or Mr. Reardon's deposition before fact discovery closed on February 10, 2016, or since then. In fact, Respondents have simply refused to schedule any LifePoint deposition until this Court rules. Ex. D (confidential exhibit). Complaint Counsel should not be penalized for Respondents' lack of diligent efforts to meet their own discovery obligations.

⁴ See Respondents' Exs. G and H (confidential exhibits).

⁵ {

} {

}

As to Mr. Gilbert, Respondents claim he is an improper witness because “he lacks sufficient personal knowledge to testify to the matters at issue in this case.” Respondents’ Mot. at 7. As an initial matter, it is unclear how Respondents could know the extent of Mr. Gilbert’s knowledge—they never deposed him or apparently even interviewed him. Respondents’ Ex. G (confidential exhibit). And contrary to Respondents’ characterizations, at no time has LifePoint represented that Mr. Gilbert had “*no knowledge*” of the relevant issues. Regardless, Respondents’ bald assertion is belied by the facts: Mr. Gilbert is LifePoint’s Executive Vice President and Chief Legal Officer; he has been with LifePoint for nearly a decade; and he is familiar with the RFP response that LifePoint’s executive team submitted for St. Mary’s and the company’s current interest in acquiring St. Mary’s, if the Cabell transaction falls through. Based on his position, and involvement in the RFP process for St. Mary’s, he has personal knowledge concerning issues related to the case.

Second, Respondents have no basis to argue that Mr. Gilbert’s testimony would be “unduly prejudicial” and “inadmissible on all potential grounds.” Scheduling Order ¶ 9. The extent of Mr. Gilbert’s personal knowledge would go to the weight, and not admissibility, of Mr. Gilbert’s testimony. *Cf. In the Matter of Daniel Chapter One*, 2009 FTC LEXIS 85, 23 (April 20, 2009). Consequently, Respondents’ motion *in limine* to exclude Mr. Gilbert’s testimony should be denied.

Finally, Respondents ask the Court to strike Mr. Reardon because, they claim, he was designated “late” and “good cause” has not been shown. As explained in Complaint Counsel’s motion filed on March 11, 2016, Mr. Reardon was timely identified on Complaint Counsel’s Preliminary Witness List, so he is properly on the Final Witness List per Provision 15 of the Court’s Scheduling Order. Moreover, there is good cause to retain Mr. Reardon on our Final

Witness List. When Complaint Counsel learned that LifePoint planned to designate Mr. Reardon in response to Respondents' corporate subpoena, we immediately approached Respondents to schedule the depositions.⁶ Respondents, on the other hand, did little before the close of discovery—or since—to schedule his deposition. Any delay in scheduling the deposition of any LifePoint witness therefore rests with Respondents. *See In re Chicago Bridge & Iron Co.*, 2002 FTC LEXIS 69, *5 (October 23, 2002).

Respondents cannot, on one hand, refuse to schedule the deposition on the many dates that LifePoint and Complaint Counsel were available, while, on the other hand, argue that Complaint Counsel should be foreclosed from utilizing LifePoint's anticipated testimony. *See Lozar v. Birds Eye Foods, Inc.*, 2012 U.S. Dist. LEXIS 12877, * 7 (W.D. Mich. Feb. 2, 2012) (“Having waited until the eleventh hour to ask for the deposition, defendant cannot be heard to complain that the deposition did not take place instantly.”); *Coene v. 3M Co.*, 303 F.R.D. 32, 50 (W.D.N.Y. 2014) (the failure to attempt to schedule a deposition belies the necessary diligence).

CONCLUSION

For the foregoing reasons, Respondents' motion *in limine* should be denied.

Respectfully submitted,

Dated: March 22, 2016

/s/ Alexis J. Gilman
 Alexis J. Gilman
 Tara Reinhart
 Thomas H. Brock
 Mark D. Seidman
 Michelle M. Yost
 Elizabeth C. Arens
 Jeanine Balbach
 Stephanie R. Cummings

⁶ Further, as we have repeatedly explained to Respondents, we are willing to replace Mr. Gilbert with Mr. Reardon on our Final Witness List to minimize the burden on all parties and LifePoint.

Melissa Davenport
Svetlana S. Gans
Nathaniel Hopkin
Elisa Kantor
David J. Laing
Matthew McDonald
Jeanne Nichols
Michael Perry
Amy Posner
Samuel I. Sheinberg
Steve Vieux

Complaint Counsel
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2579
Facsimile: (202) 326-2655

Exhibit A

[NON-PUBLIC ATTACHMENT]

CONFIDENTIAL -- REDACTED IN ENTIRETY

Exhibit B

[NON-PUBLIC ATTACHMENT]

CONFIDENTIAL -- REDACTED IN ENTIRETY

Exhibit C

[NON-PUBLIC ATTACHMENT]

CONFIDENTIAL -- REDACTED IN ENTIRETY

Exhibit D

[NON-PUBLIC ATTACHMENT]

CONFIDENTIAL -- REDACTED IN ENTIRETY

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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**[PROPOSED] ORDER DENYING RESPONDENTS' MOTION
TO STRIKE WITNESSES FROM COMPLAINT COUNSEL'S WITNESS LIST**

In consideration of the issues presented by Respondents' motion and Complaint Counsel's response, it is hereby,

ORDERED, that Respondents motion to strike witnesses from Complaint Counsel's witness list is denied.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2016, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

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

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

And I certify that I delivered via electronic mail a copy of the foregoing document to:

Geoff Irwin
Kenneth W. Field
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3963
Cabell_service@jonesday.com
*Counsel for Respondent Cabell
Huntington Hospital, Inc.*

David Simon
H. Holden Brooks
Foley & Lardner LLP
3000 K Street, N.W., Suite 600
Washington, DC 20007
(202) 945-6033
MILW-SMMCSERVICE@foley.com
*Counsel for Respondent Pallottine
Health Services, Inc. and St. Mary's
Medical Center, Inc.*

Thomas Craig
James Bailes
Bailes, Craig & Yon, PLLC
401 10th Street, Suite 500
Huntington, WV 25701
(304) 697-4700
tlc@bcyon.com
jrb@bcyon.com
*Counsel for Respondent Cabell
Huntington Hospital, Inc.*

Dated: March 22, 2016

/s/ Jeanine Balbach
Jeanine Balbach, Esq.
On behalf of Complaint Counsel

CERTIFICATE FOR ELECTRONIC FILING

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

March 22, 2016

By: s/ Jeanine Balbach