

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



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 MOTION TO RETAIN A WITNESS
ON COMPLAINT COUNSEL'S FINAL WITNESS LIST**

Pursuant to Section 3.22(c) of the Federal Trade Commission Rules of Practice ("FTC Rules"), 16 C.F.R. 3.22(c), and Paragraph 15 of the Scheduling Order, Complaint Counsel moves the Court for an Order allowing Complaint Counsel to retain Farley Reardon, Vice President – Development, of LifePoint Health, Inc. ("LifePoint" or "LifePoint Hospitals"), on Complaint Counsel's Final Witness List. A Memorandum in Support of Complaint Counsel's Motion and a Proposed Order are attached.

Respectfully submitted,

Dated: March 11, 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
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

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

In the Matter of

**Cabell Huntington Hospital, Inc.
a corporation;**

**Pallottine Health Services, Inc.
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Docket No. 9366

**COMPLAINT COUNSEL'S MEMORANDUM IN SUPPORT OF
MOTION TO RETAIN A WITNESS
ON COMPLAINT COUNSEL'S FINAL WITNESS LIST**

Pursuant to Section 3.22(c) of the Federal Trade Commission Rules of Practice ("FTC Rules"), 16 C.F.R. 3.22(c), and paragraph 15 of the Scheduling Order, Complaint Counsel moves the Court for an Order allowing Complaint Counsel to retain Farley Reardon, Vice President – Development, of LifePoint Health, Inc. ("LifePoint" or "LifePoint Hospitals"), on Complaint Counsel's Final Witness List.

BACKGROUND

Complaint Counsel timely identified three individual LifePoint witnesses on its Preliminary Witness List, dated December 11, 2015: Paul Gilbert, Leif Murphy, and Farley Reardon. In order to focus fact discovery on a more-manageable number of witnesses, thus minimizing the burden on third parties and the parties, Respondents and Complaint Counsel agreed to amend their preliminary witness lists to limit the lists to 20 third-party (and 20 party) fact witnesses. Complaint Counsel thereafter amended its Preliminary Witness List on

December 29, 2015, listing only Mr. Gilbert as a witness for LifePoint. On January 6, 2016, more than a month before the close of fact discovery, Respondents issued (1) a subpoena *duces tecum* to LifePoint, (2) a subpoena for testimony to Mr. Gilbert in his individual capacity, and (3) a subpoena for testimony by a LifePoint corporate representative, pursuant to Rule 3.33(c)(1). On January 6, 2016, Complaint Counsel sent a subpoena *duces tecum* to LifePoint. Additionally, on January 15, 2016, Complaint Counsel also sent a subpoena for testimony to Mr. Gilbert in his individual capacity and a subpoena for testimony by a LifePoint corporate representative, in order to preserve Complaint Counsel's right to half the deposition time of any LifePoint witness *noticed by both* Complaint Counsel and Respondents where the witness has not submitted a declaration, affidavit, or letter of support for the proposed transaction. Scheduling Order ¶ 13(c).

Only *after* the close of fact discovery—on February 12—did Complaint Counsel learn from LifePoint's counsel via email that LifePoint proposed Mr. Reardon as its corporate representative witness and proposed that Complaint Counsel and Respondents both forgo a deposition of Mr. Gilbert because Mr. Reardon was more knowledgeable the relevant facts, such as LifePoint's participation in St. Mary's Request for Proposal sale process; LifePoint's bid to acquire St. Mary's; and that LifePoint may continue to have an interest in acquiring St. Mary's. *See* Attachment A. Notably, LifePoint's counsel informed Complaint Counsel that he had been in discussions with Respondent Cabell's counsel about the corporate representative deposition and had given Mr. Reardon's name to Respondent's counsel on February 6—*before the close of fact discovery*. Respondent did *not* inform Complaint Counsel of these discussions, and Complaint Counsel was unaware that Mr. Reardon was being considered for the corporate-representative deposition until the February 12 email.

On February 13, Complaint Counsel responded to LifePoint's counsel and Respondents' counsel, indicating that Complaint Counsel was willing to drop Mr. Gilbert from its witness list, identify only Mr. Reardon on its witness list, and take only the deposition of Mr. Reardon, *if* Respondents did not object. Respondent failed to respond to this proposal for 11 days—until February 24, *after* the deadline for Complaint Counsel to submit its Final Witness List. *See* Attachment A. As a result of the uncertainty in resolving this witness issue at the time Complaint Counsel's Final Witness List was due on February 19, Complaint Counsel *identified both Mr. Gilbert and Mr. Reardon* as potential LifePoint witnesses on its Final Witness List.

On February 24, Respondent Cabell's counsel asked Complaint Counsel to remove Mr. Gilbert from its witness list. Again, Complaint Counsel responded that it was willing to do so if Respondents confirmed that they had no objection to Mr. Reardon remaining on Complaint Counsel Final Witness List. LifePoint's counsel then proposed five dates on which Mr. Reardon would be available for a deposition. *See* Attachment B.

On February 25, Respondent's counsel reiterated its objection to Mr. Reardon remaining on the witness list, again asked Complaint Counsel to remove Mr. Gilbert from its witness list, and did not respond to LifePoint counsel's proposed deposition dates for Mr. Reardon. The same day, Complaint Counsel reiterated it was entitled to have at least one LifePoint witness on its witness list (since three appeared on its original Preliminary Witness List, one was on its amended Preliminary Witness List, and two appeared on its Final Witness List); that the most efficient and productive path for the parties and LifePoint was to limit LifePoint depositions and witness on Complaint Counsel's Final Witness List to Mr. Reardon; and stated that any of the five dates proposed for Mr. Reardon's deposition would be acceptable. *See* Attachment A. In emails dated March 1 and March 5, Respondent's counsel continued to object to Mr. Reardon's

status on Complaint Counsel's Final Witness List, reiterated its request that Complaint Counsel remove Mr. Reardon from its Final Witness List, and continued to ask that Mr. Gilbert also be removed as well.

Finally, after conferring with LifePoint's counsel, Complaint Counsel notified Respondents on March 4 that LifePoint had agreed to accept service out of time of a *personal* subpoena on Mr. Reardon and that Mr. Reardon remained available for a deposition. On March 6, Complaint Counsel proposed that the deposition of Mr. Reardon be scheduled on March 9 or 11, as those were the remaining two dates as proposed in LifePoint counsel's February 12 email. *See Attachment A.* Respondents did not reply to that proposal until March 10, when counsel for Respondent Cabell stated that it stood by its position and that they would not be proceeding with additional depositions until the Court ruled on these issues.

ARGUMENT

Under Paragraph 15 of the Court's Scheduling Order, the "final proposed witness list may not include additional witness 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." Mr. Reardon should remain on Complaint Counsel's Final Witness List because he appeared on Complaint Counsel's original Preliminary Witness List and, in any case, there is good cause for Mr. Reardon remaining on the Final Witness List.

Indisputably, Mr. Reardon (and Mr. Gilbert) appeared on Complaint Counsel's December 11, 2015, Preliminary Witness List. That alone justifies Mr. Reardon remaining on Complaint Counsel's Final Witness List given the plain language of Paragraph 15 of the Scheduling Order,

particularly since Respondents did not object to the inclusion of any LifePoint witness on the Preliminary Witness List.

Even if Mr. Reardon's removal from the Preliminary Witness List in connection with the amended Preliminary Witness List theoretically permits Respondents to argue against his inclusion on the Final Witness List, there is good cause to allow Complaint Counsel to retain Mr. Reardon on its Final Witness List. "Good cause is demonstrated if a party seeking to extend a deadline demonstrates that a deadline cannot reasonably be met despite the diligence of the party seeking the extension." *Bradford v. Dana Corp.*, 249 F.3d 807, 809 (8th Cir. 2001); *Sosa v. Airprint Systems, Inc.*, 133 F.3rd 1417, 1418 (11th Cir. 1998). Good cause is present here by the following:

- Complaint Counsel timely identified Messrs. Gilbert and Reardon on its December 11, 2015 Preliminary Witness List;
- Respondents *and* Complaint Counsel timely served discovery on LifePoint, as an entity, and Mr. Gilbert, individually.
- Respondents learned that Mr. Reardon was the preferred witness before the close of fact discovery, but failed to notify Complaint Counsel of these developments and failed to schedule any deposition of either witness.
- Complaint Counsel did not learn that Mr. Reardon was the more knowledgeable witness until after the close of fact discovery, and Respondents did not disclose to Complaint Counsel that LifePoint was proposing Mr. Reardon as the corporate representative.

- Complaint Counsel sought to resolve the LifePoint deposition and witness issues prior to the date its Final Witness List was due, but Respondents did not reply to its proposal until after the Final Witness list was due.
- Respondents received documents showing Mr. Reardon’s involvement in this matter, which indicates he has relevant, material, and reliable testimony to provide in a deposition and to the Court at trial.

Further, there is no apparent prejudice to Respondents’ ability to take discovery of Mr. Reardon or LifePoint generally. Respondents have received hundreds of documents from LifePoint—most of which are documents sent to, received from, or related to events involving Mr. Reardon. Indeed, Respondents have identified at least 30 documents produced by LifePoint on their Final Exhibit List, many of them authored by Mr. Reardon, which belies the contention that Respondents’ discovery efforts regarding Mr. Reardon were prejudiced.

Moreover, Respondents have had ample opportunity to depose Mr. Reardon—they simply have chosen not to do so. Any prejudice in regards to discovery (or otherwise) that Respondents may allege in Mr. Reardon remaining on Complaint Counsel’s Final Proposed Witness List is caused by *Respondents own delay*.¹ See Order on Respondents’ Motion to Strike, *In the Matter of Chicago Bridge & Iron Co.*, Docket No. 9300, at 4 (October 23, 2002).²

Respondents have had over one month to schedule Mr. Reardon’s deposition and have failed to

¹ Accepting any argument by Respondents that they were prejudiced because Mr. Reardon was not able to serve as the corporate representative for *all* of the deposition topics noticed by Respondents would create a perverse incentive and ability for parties to “knock out” witness by drafting overly expansive notices of topics for deposition that a single person could not possibly answer. Rather, here, Mr. Reardon was made available for certain noticed topics and Respondents simply failed to take discovery on the topics to which Mr. Reardon was offered as the corporate representative for LifePoint. The fact that there may be other topics for which other LifePoint corporate representative witnesses may need to provide testimony (if Respondents so desire) should not serve as a basis to eliminate Mr. Reardon entirely from Complaint Counsel’s Final Witness List. If Respondents wanted to take testimony on other topics or from other witnesses, they could have filed a motion to compel, but have not done so.

² <https://www.ftc.gov/sites/default/files/documents/cases/2002/10/021023aljormswl.pdf>

schedule it, despite LifePoint making Mr. Reardon available on five dates and Complaint Counsel making itself available on all of those dates. Indeed, Respondents have failed to take or even schedule the deposition of *any* LifePoint representative (including Mr. Gilbert, who undoubtedly was properly listed on Complaint Counsel's Final Witness List).

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully moves this Court for an Order allowing Complaint Counsel to retain Mr. Reardon on Complaint Counsel's Final Proposed Witness List.

Respectfully submitted,

Dated: March 11, 2016

/s/ Alexis J. Gilman

Alexis J. Gilman
Tara Reinhart
Thomas H. Brock
Mark D. Seidman
Michelle M. Yost
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Jeanine Balbach
Stephanie R. Cummings
Melissa Davenport
Svetlana S. Gans
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ATTACHMENT A

Gilman, Alexis

From: Gilman, Alexis
Sent: Sunday, March 06, 2016 4:36 PM
To: 'Melissa Eakle Leasure'
Cc: 'McCann, Robert W'; 'Geoffrey S Irwin'; 'kruttenberg@jonesday.com'; 'Tara Zurawski'; 'HBrooks@foley.com'; 'bludwig@foley.com'; Seidman, Mark; Yost, Michelle; Brock, Thomas H.; Gans, Svetlana
Subject: RE: CHH-SMMC - Subpoena to LifePoint
Attachments: RE: CHH-SMMC - Subpoena to LifePoint

Counsel:

Further to the correspondence below, and pursuant to Respondent's January 6 and Complaint Counsel's January 15 subpoenas to LifePoint's corporate representative, Complaint Counsel proposes that we proceed with the deposition of Mr. Reardon as the corporation representative of LifePoint on March 9 or 11 as proposed in Mr. McCann's February 24 email (attached). Complaint Counsel is ready to proceed with the deposition of Mr. Reardon on Topics 2, 7, and 9, as indicated in Mr. McCann's email, as well as any other relevant topics to which Mr. Reardon can testify. Complaint Counsel is available to travel to Knoxville or another location for the deposition. We request that LifePoint's please confirm that Mr. Reardon is still available on those dates (or propose alternative dates) and that Respondents' counsel confirm their availability for the deposition (or propose alternative dates). Thank you.

Regards,

Alexis

Alexis James Gilman
 400 7th Street, SW | Washington, DC 20580 | 202.326.2579 (direct) | 202.326.2655 (fax) | agilman@ftc.gov

From: Gilman, Alexis
Sent: Friday, March 04, 2016 11:33 AM
To: 'Melissa Eakle Leasure'
Cc: 'McCann, Robert W'; 'Geoffrey S Irwin'; 'kruttenberg@jonesday.com'; 'Tara Zurawski'; 'HBrooks@foley.com'; 'bludwig@foley.com'; Seidman, Mark; Yost, Michelle; Brock, Thomas H.; Gans, Svetlana
Subject: RE: CHH-SMMC - Subpoena to LifePoint

Melissa,

LifePoint's counsel indicates that LifePoint will not object to Mr. Reardon being served with a personal deposition notice out of time. Neither will Complaint Counsel. Therefore, if Respondents wish to depose Mr. Reardon in his personal capacity and/or as a corporate representative, there is no obstacle to Respondents doing so. LifePoint has already proposed several dates for a deposition of Mr. Reardon and Respondents have let multiple dates go by already. There are more dates proposed for next week, and Complaint Counsel is available on those dates. Please confirm which date Respondents would like to depose Mr. Reardon.

Also let us know if and when you plan to depose Mr. Gilbert. He remains on our Final Witness List unless and until Respondents drop their objection to Mr. Reardon remaining on our Final Witness List.

We are flexible on dates for the deposition of Mr. Gilbert and Mr. Reardon, but want to complete these depositions as soon as possible—if Respondents plan to take any depositions of LifePoint—because we are well past the point when Respondents should have finalized the scheduling of any LifePoint deposition that they intend to take.

Regards,

Alexis

Alexis James Gilman
400 7th Street, SW | Washington, DC 20580 | 202.326.2579 (direct) | 202.326.2655 (fax) | agilman@ftc.gov

From: Melissa Eakle Leasure [<mailto:mel@bcyon.com>]
Sent: Friday, February 26, 2016 9:12 PM
To: Gilman, Alexis
Cc: 'McCann, Robert W'; 'Geoffrey S Irwin'; kruttenberg@jonesday.com; 'Tara Zurawski'; HBrooks@foley.com; bludwig@foley.com; Seidman, Mark; Yost, Michelle; Brock, Thomas H.; Gans, Svetlana
Subject: Re: CHH-SMMC - Subpoena to LifePoint

Alexis,

We do not agree that this solution you propose, swapping Farley Reardon for Paul Gilbert, can be characterized as a reasonable accommodation. Instead, we believe that adding Mr. Reardon to the witness list is not only impermissible under the scheduling order, without leave of court, but is also highly prejudicial to Respondents. The scheduling order clearly states that parties should notify opposing parties of changes in the witness list promptly in order to facilitate completion of discovery within the dates of the scheduling order. However, as you know, fact discovery is now closed and being required to complete discovery at this late date is highly prejudicial to Respondents. Further, the scheduling order provides that the final witness lists may not include witnesses not included in the preliminary witness list previously exchanged without consent of all parties or a court order. Again, as noted in earlier correspondence, Farley Reardon was not included in the initial disclosures nor the 12/29/15 witness list. As such, if the FTC wishes to add Mr. Reardon to the witness list, it is our position that the FTC should seek leave of court, which has not occurred.

Further, adding a new witness to the witness list is contrary to the agreement of the parties in developing the amended witness lists. As you may recall, the FTC's original witness list was extremely lengthy consisting of 169 witnesses. It would have been impossible to conduct discovery, within the confines of the scheduling order, with that volume of potential witnesses. After a lengthy meet and confer process, in an email from Michele Yost dated 12/23/15, the FTC offered to limit discovery to no more than 20 third party witnesses. In response, Respondents agreed to this proposal in an email dated 12/28/15. In this email, it was clearly stated by Cabell that "[n]o new witnesses can be added after this exchange without good cause shown." Thereafter, in light of the agreement reached by the parties, the FTC submitted an amended witness list to Cabell on 12/29/15. Mr. Reardon does not appear on this list. And, accordingly, discovery was limited to individuals that appeared on the witness list.

As such, Cabell served an individual subpoena on Paul Gilbert, not Farley Reardon. Although you suggest that LifePoint, the company, was included on the 12/29/15 witness list, companies do not have the personal knowledge required of trial witness, people do. If company name was sufficient on a witness list, there would be no reason ever to list an individual name on any witness list, and witnesses from companies could be swapped infinitely. The FTC had an obligation to properly identify individual witnesses in advance of submitting its witness list. Indeed, the FTC had over a year to investigate this merger and identify third party witnesses. The FTC specifically chose to list Paul Gilbert of LifePoint as the proposed witness, not Mr. Reardon, and Cabell proceeded with discovery accordingly. The FTC has not provided Cabell with any demonstration of good cause as to why Mr. Reardon should now be included in the witness list after the close of discovery. The FTC has been in communications with LifePoint for at least 7 months

as indicated by the declaration obtained by the FTC from a LifePoint employee. Therefore, the FTC has had significant opportunity to educate itself as to which LifePoint representative should have been included on the witness list. The FTC has not provided Cabell with any demonstration of good cause as to why Mr. Reardon should newly be included on a witness list two months after the amended witness list was provided to Respondents, and after the close of fact discovery.

Cabell does not agree to adding Mr. Reardon at this late date, due to the significant prejudice to Respondents. Respondents were able to serve an individual subpoena on Mr. Gilbert to obtain his personal testimony on all issues relevant to this case. To accommodate LifePoint, Respondents are willing to depose Mr. Gilbert well after the close of discovery. In contrast, Mr. Reardon is solely being offered by LifePoint as a corporate representative for certain topics so Respondents will necessarily be limited in the lines of questions that can be addressed in a deposition of Mr. Reardon. Respondents have been given no notice by the FTC as to the issues or topics Mr. Reardon will be testifying, but can only rely on informal communications with the FTC and LifePoint to assume the content of Mr. Reardon's testimony. With the close of fact discovery, Respondents no longer have the opportunity to serve a subpoena on Mr. Reardon in his personal capacity, nor prepare for the deposition of an entirely new witness. Further, we are dealing with an extremely compressed and complex expert discovery with a report due March 2, and the subsequent expert depositions, as well as briefing now due to the court. As such, we are not in a position to begin discovery anew with a new witness.

If you do not agree to removing Mr. Gilbert from your witness list, we will move forward with his deposition. As to Mr. Reardon, we intend to move forward with a motion to strike,.

Melissa

From: "Gilman, Alexis" <agilman@ftc.gov>
To: 'Melissa Eakle Leasure' <mel@beyond.com>
Cc: "'McCann, Robert W'" <Robert.McCann@dbr.com>, 'Geoffrey S Irwin' <gsirwin@JonesDay.com>, "kruttenberg@jonesday.com" <kruttenberg@jonesday.com>, 'Tara Zurawski' <tzurawski@jonesday.com>, "HBrooks@foley.com" <HBrooks@foley.com>, "bludwig@foley.com" <bludwig@foley.com>, "Seidman, Mark" <MSEIDMAN@ftc.gov>, "Yost, Michelle" <myost@ftc.gov>, "Brock, Thomas H." <TBROCK@ftc.gov>, "Gans, Svetlana" <sgans@ftc.gov>
Sent: 2/25/2016 9:11 PM
Subject: RE: CHH-SMMC - Subpoena to LifePoint

Melissa,

We are trying to work collaboratively to identify a solution that will allow Respondents and Complaint Counsel to pursue necessary discovery and prepare for trial while minimizing the burden on third parties. Accordingly, we are willing to remove Mr. Gilbert from our witness list provided there's no objection to including Mr. Reardon as the LifePoint representative on our witness list. If we can reach such a reasonable accommodation, we are also willing to consent to Respondents' scheduling a deposition well after the close of fact discovery, including – to our detriment – after the deadline for Complaint Counsel to submit its expert reports and final witness lists.

To clarify, Mr. McCann's email does not say Mr. Gilbert has "no knowledge" relevant to this case; rather, he has explained that Mr. Reardon is more knowledgeable than Mr. Gilbert regarding the relevant issues in this case. LifePoint has been on our witness list from the outset and there is no delay or apparent prejudice to Respondents caused by substituting Mr. Reardon for Mr. Gilbert, so we don't understand why you would object to our identifying Mr. Reardon on the witness list.

In any case, we will have at least one witness for LifePoint on our final witness list. We think it best for everyone that we limit it to just Mr. Reardon—the witness LifePoint has identified as most knowledgeable about the relevant issues— and are willing to do so if you drop your objection. If you refuse to engage in productive discussions to resolve this issue, we will have no choice but to keep both Mr. Reardon and Mr. Gilbert on our witness list, merely out of abundance of caution and not because we believe it is necessary to have two LifePoint witnesses involved in this litigation.

Finally, we are prepared to accept any of the dates Mr. McCann proposed for the deposition of Mr. Reardon.

Alexis

From: Melissa Eakle Leasure [<mailto:mel@bcyon.com>]
Sent: Thursday, February 25, 2016 4:56 PM
To: Gilman, Alexis
Cc: 'McCann, Robert W'; 'Geoffrey S Irwin'; kruttenberg@jonesday.com; 'Tara Zurawski'; HBrooks@foley.com; bludwig@foley.com; Seidman, Mark; Yost, Michelle; Brock, Thomas H.; Gans, Svetlana
Subject: RE: CHH-SMMC - Subpoena to LifePoint

Alexis,

We are requesting that Mr. Gilbert be removed from the FTC witness list because we have been told that Mr. Gilbert has no knowledge relevant to this case. Whether or not the FTC is allowed to include Mr. Reardon on the witness list after the end of discovery in this case is not relevant to our request. We moved forward in discovery issuing subpoenas to those individuals included by the FTC on the 12/29/15 witness list. The sole witness from LifePoint on the 12/29/15 FTC witness list was Mr. Gilbert. If the FTC does not agree to remove Mr. Gilbert, we will move forward deposing him.

Melissa

From: Gilman, Alexis [<mailto:agilman@ftc.gov>]
Sent: Wednesday, February 24, 2016 9:04 PM
To: 'Melissa Eakle Leasure'
Cc: McCann, Robert W; Geoffrey S Irwin(gsirwin@JonesDay.com); kruttenberg@jonesday.com; Tara Zurawski; HBrooks@foley.com; bludwig@foley.com; Seidman, Mark; Yost, Michelle; Brock, Thomas H.; Gans, Svetlana
Subject: RE: CHH-SMMC - Subpoena to LifePoint

Melissa,

If our understanding is correct that (1) Mr. Reardon (not Mr. Gilbert) is the person that Lifepoint designates as the person with knowledge of the topics set out in Mr. McCann's email below, and (2) that Respondents agree to drop their subpoena to Mr. Gilbert and not object to our inclusion of Mr. Reardon on our witness list, then, yes, we agree drop Mr. Gilbert from our witness list. At the time that our witness list was due, the LifePoint witness issue had not been resolved, so we needed to list both persons, but we also believe it would be preferable to limit the witness list and deposition to one person from LifePoint. Please let me know if our understanding is correct and, if so, we confirm our agreement to drop Mr. Gilbert from our witness list. Thank you.

Regards,

Alexis

From: Melissa Eakle Leasure [<mailto:mel@bcyon.com>]
Sent: Wednesday, February 24, 2016 6:00 PM
To: Gilman, Alexis
Cc: McCann, Robert W; Geoffrey S Irwin(gsirwin@JonesDay.com); kruttenberg@jonesday.com; Tara Zurawski; HBrooks@foley.com; bludwig@foley.com
Subject: RE: CHH-SMMC - Subpoena to LifePoint

Alexis,

From our conversations with Rob McCann, counsel for LifePoint, it is our understanding that Paul Gilbert has no information that is responsive to the topics at issue in this litigation. Further, based upon your email to Rob McCann dated February 13, 2016, it is our understanding that the FTC's interest in LifePoint is "focused" and that Mr. Gilbert is not the appropriate person to address those focused issues. As such, we would prefer not to waste resources by deposing Mr. Gilbert. Cabell is willing to drop its

individual Subpoena *Ad Testificandum* to Paul Gilbert if the FTC removes Mr. Gilbert from their witness list. If Mr. Gilbert remains on the FTC's witness list, we have no choice but to depose him in order to effectively represent our client. PUBLIC

Please let us know your thoughts.

From: Gilman, Alexis [<mailto: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

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From: "McCann, Robert W" <Robert.McCann@dbr.com>
Subject: CHH-SMMC - Subpoena to LifePoint
Date: 12 February 2016 22:31
To: "Sheinberg, Samuel I." <SSHEINBERG@ftc.gov>, "Melissa Eakle Leasure (mel@bcyon.com)" <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 ~~Public~~ interested 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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If this email is spam, report it to www.OnlyMyEmail.com

ATTACHMENT B

Gilman, Alexis

From: McCann, Robert W <Robert.McCann@dbr.com>
Sent: Wednesday, February 24, 2016 9:38 PM
To: Gilman, Alexis; 'Melissa Eakle Leasure'
Cc: Geoffrey S Irwin(gsirwin@JonesDay.com); kruttenberg@jonesday.com; Tara Zurawski; HBrooks@foley.com; bludwig@foley.com; Seidman, Mark; Yost, Michelle; Brock, Thomas H.; Gans, Svetlana
Subject: RE: CHH-SMMC - Subpoena to LifePoint

Assuming the respondents are agreeable to Mr. Gilman's proposal, Mr. Reardon is available as follows:

3/1 – afternoon
 3/2 – afternoon
 3/4 - afternoon
 3/9 – afternoon
 3/11 – afternoon

3/1 and 3/2 are problematic for counsel, but I left those dates on the list in case no other date is workable. Thanks.

Rob

From: Gilman, Alexis [mailto:agilman@ftc.gov]
Sent: Wednesday, February 24, 2016 9:04 PM
To: 'Melissa Eakle Leasure'
Cc: McCann, Robert W; Geoffrey S Irwin(gsirwin@JonesDay.com); kruttenberg@jonesday.com; Tara Zurawski; HBrooks@foley.com; bludwig@foley.com; Seidman, Mark; Yost, Michelle; Brock, Thomas H.; Gans, Svetlana
Subject: RE: CHH-SMMC - Subpoena to LifePoint

Melissa,

If our understanding is correct that (1) Mr. Reardon (not Mr. Gilbert) is the person that Lifepoint designates as the person with knowledge of the topics set out in Mr. McCann's email below, and (2) that Respondents agree to drop their subpoena to Mr. Gilbert and not object to our inclusion of Mr. Reardon on our witness list, then, yes, we agree drop Mr. Gilbert from our witness list. At the time that our witness list was due, the LifePoint witness issue had not been resolved, so we needed to list both persons, but we also believe it would be preferable to limit the witness list and deposition to one person from LifePoint. Please let me know if our understanding is correct and, if so, we confirm our agreement to drop Mr. Gilbert from our witness list. Thank you.

Regards,

Alexis

From: Melissa Eakle Leasure [mailto:mel@bcyon.com]
Sent: Wednesday, February 24, 2016 6:00 PM
To: Gilman, Alexis
Cc: McCann, Robert W; Geoffrey S Irwin(gsirwin@JonesDay.com); kruttenberg@jonesday.com; Tara Zurawski; HBrooks@foley.com; bludwig@foley.com
Subject: RE: CHH-SMMC - Subpoena to LifePoint

Alexis,

From our conversations with Rob McCann, counsel for LifePoint, it is our understanding that Paul Gilbert has no information that is responsive to the topics at issue in this litigation. Further, based upon your email to Rob McCann dated February 13, 2016, it

is our understanding that the FTC's interest in LifePoint is "focused" and that Mr. Gilbert is not the appropriate person to address those focused issues. As such, we would prefer not to waste resources by deposing Mr. Gilbert. Cabell is willing to drop its individual Subpoena *Ad Testificandum* to Paul Gilbert if the FTC removes Mr. Gilbert from their witness list. If Mr. Gilbert remains on the FTC's witness list, we have no choice but to depose him in order to effectively represent our client.

Please let us know your thoughts.

From: Gilman, Alexis [<mailto: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 7th Street, SW | Washington, DC 20580 | 202.326.2579 (direct) | 202.326.2655 (fax) | agilman@ftc.gov

From: "McCann, Robert W" <Robert.McCann@dbr.com>
Subject: CHH-SMMC - Subpoena to LifePoint
Date: 12 February 2016 22:31
To: "Sheinberg, Samuel I." <SSHEINBERG@ftc.gov>, "Melissa Eakle Leasure (mel@bcyon.com)" <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 ~~Public~~ interested 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
Drinker Biddle & Reath LLP
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**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.)	
)	

**COMPLAINT COUNSEL'S STATEMENT OF CONFERENCES
WITH RESPONDENTS TO RESOLVE DISCOVERY DISPUTE**

As required by Paragraph 4 of the Additional Provisions of the Scheduling Order that the Court has entered in this matter, Complaint Counsel states that the parties have conferred on multiple occasions in good faith efforts to resolve a discovery dispute related to Complaint Counsel's retention of a witness on its Final Witness List. Efforts to confer on this issue have included numerous communications, including multiple email communications that began on February 12, 2016 and continued through March 10, 2016. Participants in these multiple email communications to confer on this discovery dispute and seek a resolution have included Alexis Gilman from Complaint Counsel and Melissa Eakle Leasure and Tara Zurawski for Respondent Cabell Huntington Hospital.

The parties have not been able to reach a resolution of this discovery dispute, despite these multiple good faith communications. As a result, Complaint Counsel respectfully

requests that the Court review the dispute and issue an appropriate order.

Counsel for Respondents have stated they will oppose this motion.

Respectfully submitted,

Dated: March 11, 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
Melissa Davenport
Svetlana S. Gans
Nathaniel Hopkin
Elisa Kantor
David J. Laing
Matthew McDonald
Jeanne Nichols
Michael Perry
Amy Posner
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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.)	
_____)	

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

In consideration of the issues presented by Complaint Counsel's motion, and the parties' briefs discussing the relevant authorities, it is hereby,

ORDERED, that Complaint Counsel's Motion to Retain a Witness, Mr. Farley Reardon, on its Final Witness List, is granted.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 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:

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Kerri L. Ruttenberg
Kenneth W. Field
Michael S. Fried
Louis K. Fisher
Tara Lynn R. Zurawski
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*Counsel for Respondent Cabell
Huntington Hospital, Inc.*

Dated: March 11, 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.

Dated: March 11, 2016

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