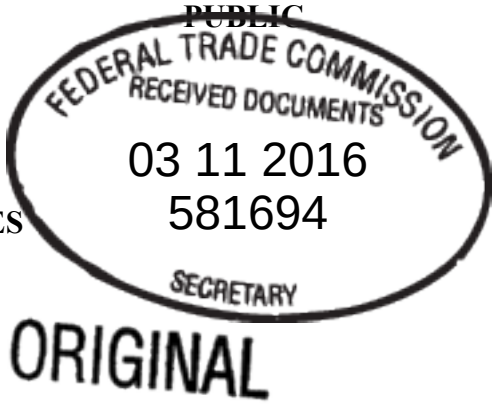
PUBLIC



ORIGINAL

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. 9366**

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

Respondents ask the Court to enforce the terms of its Scheduling Order and to strike four witnesses identified on Complaint Counsel's Final Proposed Witness List. Allowing any of these witnesses to testify at trial will unfairly prejudice Respondents.

FACTUAL BACKGROUND

On December 11, 2015, Complaint Counsel served its Preliminary Witness List, which contained over 165 witnesses. *See* **Exs. A, B**. Respondents' Preliminary Witness List included 80 witnesses. In light of the compressed discovery timeline, the parties agreed to pare down their witness lists. *See* **Ex. C**, at 1. Both sides did so, exchanging Revised Preliminary Witness Lists. The parties further agreed that no "new witnesses" would be added to those included on their respective Revised Preliminary Witness Lists absent a showing of "good cause," or "by agreement of the parties." *Id*. at 2. Complaint Counsel (on February 19, 2016) and Respondents (on March 7, 2016) have now exchanged their Final Proposed Witness Lists for trial.

1. Tim Donahoe

Complaint Counsel included Tim Donahoe (Energy Services of America Corporation) on its initial Preliminary Witness List, and he remained on Complaint Counsel's Revised Preliminary Witness List. Respondents timely subpoenaed Mr. Donahoe for a deposition and diligently worked with his counsel to try to schedule the deposition, but Mr. Donahoe was hospitalized shortly before his scheduled deposition date of January 27, 2016, and the deposition did not proceed. *See* **Ex. D**. Then, on February 29, 2016, well after the close of discovery and a month before trial, Complaint Counsel suddenly insisted that Mr. Donahoe is healthy and available for a deposition, and Complaint Counsel refuse to remove him from its Final Proposed Witness List. *See* **Ex. E**.

2. Cindy Winings

Complaint Counsel timely included Cindy Winings of United Healthcare on its Revised Preliminary Witness List. Respondents deposed Ms. Winings in her individual capacity and as a corporate representative for United. REDACTED

REDACTED

REDACTED

3. Paul Gilbert

On its initial list and again on its Revised Preliminary Witness List, Complaint Counsel listed Paul Gilbert of LifePoint. On January 6, 2016, Cabell served a subpoena for Mr. Gilbert's deposition in his individual capacity, and a corporate deposition of LifePoint. Respondents worked with LifePoint to schedule Mr. Gilbert's deposition, and were willing to take his deposition after the discovery period ended to accommodate the witness. However, on February 12, 2016, LifePoint's counsel told Respondents that Mr. Gilbert has no particular knowledge of and no position on the matter. *See* **Ex. G.** Then on February 19, 2016, as Respondents continued to press for a deposition of Mr. Gilbert, LifePoint reiterated that they would produce the witness, though "I have already told you that [Mr. Gilbert] has nothing to say." *See id.* Although Respondents have continued seeking a deposition, including as late as March 1, 2016, LifePoint has consistently refused to provide any dates for Mr. Gilbert's deposition. *See, e.g.,* **Ex. H.**

REDACTED

See **Ex. I**.

LifePoint reiterated its position to both Respondents and Complaint Counsel, but Complaint Counsel nonetheless has included him on every iteration of its witness list.

4. Farley Reardon

Meanwhile, Respondents kept pressing LifePoint for a corporate designee. LifePoint never suggested Mr. Gilbert, but in early February 2016, they finally identified Mr. Reardon and others as individuals who *might* be able to address *some* topics in the corporate subpoena.[1,2] Mr. Reardon was not listed on Complaint Counsel's Revised Preliminary Witness List, but because LifePoint had now identified him as a witness more knowledgeable than Mr. Gilbert, Complaint Counsel sought to add Mr. Reardon to its Final Proposed Witness List in Mr. Gilbert's place. Complaint Counsel expressed it was "willing to take Mr. Gilbert off our witness list and replace him with Mr. Reardon . . . with Mr. Reardon as the 30(b)(6) or however respondents want to proceed with the LifePoint witness." Ultimately, Complaint Counsel has kept *both* Mr. Gilbert and Mr. Reardon on its Final Proposed Witness List.

LEGAL STANDARD

Motions *in limine* seek "to exclude anticipated prejudicial evidence before the evidence is actually offered." *In re Basic Research, LLC*, Dkt. 9318, 2005 WL 3475715, at *1 (Dec. 7, 2005) (applying motion *in limine* standard to motions to strike) (citations omitted). A court should exclude evidence subject to a motion *in limine* when the evidence is inadmissible. *See In re LabMD, Inc.*, Dkt.9357, 2015 WL 1849042, at *2 (Apr. 16, 2015). And, where the introduction of evidence would be unfairly prejudicial to a party, Rule of Practice 3.43(b)

[1] LifePoint also explained that its corporate structure was compartmentalized, so multiple witnesses would be needed to address the corporate topics, to the extent anyone could do so.

[2] LifePoint expressed its willingness to offer Mr. Reardon as a corporate designee on a very limited number of topics in the subpoena and suggested multiple dates for a deposition. Respondents narrowed the subpoena topics, but LifePoint insisted Mr. Reardon could only provide full testimony on three topics and very limited testimony on two others, and would not produce additional witnesses for the remaining (narrowed) set of topics. Although the FTC expressed its own willingness to go forward with Mr. Reardon's deposition on LifePoint's proposed dates, the dates were unworkable for Respondents due to (a) the lack of agreement on the topics, and (b) substantial and delayed document productions by LifePoint that mattered to Respondents. Ultimately, no witness or set of witnesses was offered by LifePoint that could address even the narrowed topics in Respondents' corporate subpoena, and no depositions have occurred.

empowers this Court to exclude such evidence. *See* 16 C.F.R. § 3.43(b) ("Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice…."); *see also In re Intel Corp.*, Dkt.9341, 2010 FTC LEXIS 45, at *6–7, *15 (May 6, 2010)(excluding evidence when "its probative value is substantially outweighed by the danger of unfair prejudice").

ARGUMENT

The following witnesses should be stricken from Complaint Counsel's Final Proposed Witness List for the reasons set forth below.

1. Tim Donahoe

Rule of Practice 3.33 provides that "[a]ny party may take a deposition of any named person or of a person or persons described with reasonable particularity, provided that such deposition is reasonably expected to yield information within the scope of discovery under § 3.31(c)(I)…." *See* 16 C.F.R. § 3.33. That rule, in conjunction with Rule 3.31(c)(I), affords parties the "right" to depose individuals that appear on the opposing party's witness list. *See In re Intel Corp.*, Dkt.9341, 2010 FTC LEXIS 48, at *2 (May 28, 2010).

Where a party is foreclosed from deposing a witness who appears on the opposing party's witness list, the opposing party may not solicit testimony from the witness who failed to appear. *See, e.g., In re Jerk, LLC*, Dkt.9361, 2015 FTC LEXIS 51, at *17 (Mar. 11, 2015) (because of "[respondent's] discovery failures" including a failure to appear for depositions "a just and reasonable sanction [was] to bar [respondent] from introducing into evidence or otherwise relying… upon any improperly withheld…witnesses….").

Here, due to his health, Mr. Donahoe was unable to sit for a deposition despite Respondents' diligent attempts to schedule one. Respondents should not be expected to take his

deposition now – after the close of discovery in the midst of expert depositions, and with trial preparation in full swing less than a month away – having been suddenly and belatedly informed that Mr. Donahoe is well enough to provide testimony. With trial fast approaching, it would be highly prejudicial to require Respondents to do so. Indeed, at the same time Complaint Counsel seek to prejudice Respondents by forcing us to depose fact witnesses when we need to be preparing for trial, they are preventing any mitigation of that prejudice by insisting that trial go forward as scheduled even though the case is unripe, as explained in the parties' separate briefing submitted to the Court. The Court should strike Mr. Donahoe from Complaint Counsel's Final Proposed Witness List because Respondents did not have a reasonable opportunity to depose him during the discovery period.

2. Cindy Winings

Where a company designates an individual as a 30(b)(6) corporate representative,[3] but does not adequately prepare the individual to testify regarding the topics noticed in the subpoena, the witness is deemed to have failed to appear for that deposition and it is as if the party seeking the deposition was altogether denied its right to the relevant discovery. *See, e.g., Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000). Indeed, where a corporate representative is uneducated as to the noticed deposition topics, it would be unreasonable to permit that representative to testify at trial as to those topics.

REDACTED

[3] Rule of Practice 3.33(c)(1) is the Federal Trade Commission's analogue to the well-known Federal Rule of Civil Procedure 30(b)(6). Thus, because the Federal Trade Commission has adopted a Rule of Practice that is substantially similar to Federal Rule of Civil Procedure 30(b)(6), judicial constructions of 30(b)(6) can serve as interpretive—but not binding—aids. *See In re Jerk, LLC*, at *8.

REDACTED

REDACTED Ms. Winings should be stricken from Complaint Counsel's Final Proposed Witness List both in her individual capacity and as a corporate representative of United.

3. Paul Gilbert

This Court's Scheduling Order explicitly provides that "[w]itnesses 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." **Ex. A**, at 8. REDACTED

REDACTED Respondents were similarly informed of Mr. Gilbert's lack of knowledge on February 12, 2016, when LifePoint's counsel explained that "Mr. Gilbert has had minimal involvement with and has minimal knowledge of, the Huntington matter." **Ex. G**. Any testimony that Mr. Gilbert may give at trial would plainly violate the personal knowledge requirement in this Court's Scheduling Order and Federal Rule of Evidence 602.

Moreover, Respondents have engaged in diligent efforts to depose Mr. Gilbert, solely because Complaint Counsel refused to remove Mr. Gilbert from its witness list despite his lack of knowledge. Despite those efforts, Respondents have been unable to take Mr. Gilbert's deposition.

Thus, because Mr. Gilbert lacks sufficient personal knowledge to testify to the matters at issue in this case, and because Respondents have not been able to depose him in any event, this Court should strike Mr. Gilbert from Complaint Counsel's Final Proposed Witness List.

4. Farley Reardon

Complaint Counsel's late designation of Mr. Reardon plainly violates this Court's Scheduling Order, which mandates 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.*" **Ex. A**, at 8 (emphasis added). This "consent or good cause" requirement is not novel. *See In re Chicago Bridge & Iron Co., N.V.*, Dkt. 9300, 2002 FTC LEXIS 69, at *2 (Oct. 23, 2002). Because consent has not been given, it is incumbent upon Complaint Counsel to demonstrate to this Court why it had good cause for the late designation—it cannot do so.

"Good cause [for allowing testimony of a late-designated witness] is demonstrated if a party seeking to extend a deadline shows that a deadline cannot reasonably be met despite the diligence of the party seeking the extension." *See id.* at *5–6 (citations omitted). Here, Complaint Counsel had ample time to identify the appropriate witness from LifePoint to include on its witness list. REDACTED

See **Ex. I**. Respondents played no role in Complaint Counsel's delay in learning about Mr. Reardon as a more knowledgeable witness than Mr. Gilbert, and "[s]imply claiming that the importance of these individuals was learned late in the discovery process does not satisfy the 'good cause' standard since diligence is required in pursuing discovery." *Id.* at *8. Moreover, taken to its logical conclusion, allowing Complaint Counsel to simply "swap" out one witness for another just because it included the company's name on its Revised Proposed Witness List would render the Scheduling Order and the parties' agreement meaningless – for example, Cabell could swap out any listed Cabell

Huntington Hospital witness for any other witness at the hospital, at any time, without good cause or Complaint Counsel's agreement.

Complaint Counsel should not be allowed to violate the Scheduling Order by belatedly designating Mr. Reardon when that late designation stems directly from Complaint Counsel's lack of diligence. Accordingly, this Court should strike Mr. Reardon from Complaint Counsel's Final Proposed Witness List.

CONCLUSION

For the reasons stated herein, Respondents respectfully request that the Court strike Mr. Donahoe, Ms. Winings, Mr. Gilbert and Mr. Reardon from Complaint Counsel's Final Proposed Witness List and preclude these witnesses from testifying at trial.

Dated: March 11, 2016

Respectfully submitted,

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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:** **Pallottine Health Services, Inc. a corporation;** **and** **St. Mary's Medical Center, Inc. a corporation;**	)	**Docket No. 9366**

RESPONDENTS' MEET AND CONFER STATEMENT

Pursuant to the Scheduling Order issued on December 4, 2015, counsel conferred regarding the issues raised in this motion by a series of detailed letters, emails, and phone calls in the days leading up to filing this motion. No agreement was reached, and therefore on March 10, 2016, Cabell's counsel provided Complaint Counsel via electronic mail notice of its intent to file the instant motion. Complaint Counsel advised Cabell's counsel that it would oppose this motion.

Dated: March 11, 2016

Dated: March 11, 2016

Respectfully submitted,

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UNITED STATES OF AMERICA
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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. 9366**

[PROPOSED] ORDER ON RESPONDENTS' MOTION TO STRIKE WITNESSES FROM COMPLAINT COUNSEL'S FINAL PROPOSED WITNESS LIST

On March 11, 2016, Respondents filed a motion to strike certain witnesses from Complaint Counsel's Final Proposed Witness List and, thus, preclude those witnesses testimony at trial in this matter.

Respondents' motion 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 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:

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Federal Trade Commission
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PUBLIC

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,	)	
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: oalj@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 oalj@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 oalj@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 M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: December 4, 2015

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REDACTED

From: Jessica Casey/JonesDay
To: "Gans, Svetlana" <sgans@ftc.gov>
Cc: "bludwig@foley.com" <bludwig@foley.com>, "hbrooks@foley.com" <hbrooks@foley.com>, Lindsey Lonergan <llonergan@jonesday.com>, "Seidman, Mark" <MSEIDMAN@ftc.gov>, "Yost, Michelle" <myost@ftc.gov>, Tara Zurawski <tzurawski@jonesday.com>
Date: 01/26/2016 05:20 PM
Subject: RE: In re Cabell Huntington Hospital (No. 9366) -- ESA Deposition Tomorrow

---

Svetlana,

The address is 611 Third Avenue, Huntington, WV 25701.

We agree to split the time equally between both sides.

Thank you,
Jessica

Jessica C. Casey (bio)
Associate
JONES DAY® - One Firm Worldwide℠
1420 Peachtree Street, NE
Suite 800
Atlanta, Georgia 30309
Office: 404.581.8582
Fax: 404.581.8330
Cell: 770.329.2273
Email: jcasey@jonesday.com

From: "Gans, Svetlana" <sgans@ftc.gov>
To: 'Jessica Casey' <jcasey@jonesday.com>, "Yost, Michelle" <myost@ftc.gov>, "Seidman, Mark" <MSEIDMAN@ftc.gov>

Cc: Tara Zurawski <tzurawski@jonesday.com>, Lindsey Lonergan <llonergan@jonesday.com>, "bludwig@foley.com" <bludwig@foley.com>, "hbrooks@foley.com" <hbrooks@foley.com>
Date: 01/26/2016 04:52 PM
Subject: RE: In re Cabell Huntington Hospital (No. 9366) -- ESA Deposition Tomorrow

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Jessica,

Dinsmore is fine; thank you. Can you please confirm the address? In addition, we wanted to confirm that per provision 13(c) of the Scheduling Order, because Mr. Krimmel did not submit a declaration, the deposition time will be allocated evenly between the two sides. If you disagree, please let us know.

Thanks,
Svetlana

From: Jessica Casey [mailto:jcasey@jonesday.com]
Sent: Tuesday, January 26, 2016 2:35 PM
To: Gans, Svetlana; Yost, Michelle; Seidman, Mark
Cc: Tara Zurawski; Lindsey Lonergan; bludwig@foley.com; hbrooks@foley.com
Subject: In re Cabell Huntington Hospital (No. 9366) -- ESA Deposition Tomorrow

Counsel,

Please note that due to unforeseen medical issues and a sudden hospitalization, Tim Donahoe is unable to appear for deposition tomorrow. Charles Krimmel has agreed to step in as the corporate representative for Energy Services of America.

It is unclear to us whether final space for this deposition had been confirmed. Dinsmore & Shohl has available space and has offered to host the deposition. Please let us know if you disagree, otherwise we will plan to move forward with this location.

Thank you,
Jessica

Jessica C. Casey (bio)
Associate
JONES DAY® - One Firm Worldwide℠
1420 Peachtree Street, NE
Suite 800
Atlanta, Georgia 30309
Office: 404.581.8582
Fax: 404.581.8330
Cell: 770.329.2273
Email: jcasey@jonesday.com

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This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.
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Alexis J. Gilman
202.326.2579
agilman@ftc.gov

March 3, 2016

Tara Lynn R. Zurawski, Esq.
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001

Re: Cabell Huntington Hospital/St. Mary's Medical Center, Docket No. 9366: Complaint Counsel's Witness List

Dear Tara,

I write to respond to your March 1, 2016, letter requesting that Complaint Counsel remove certain witnesses from its witness list.

At the outset, your letter does not articulate how Respondents have been prejudiced or precluded from taking discovery from these witnesses. For each of the witnesses identified in your letter, it is the case that either discovery has been taken, or based on Complaint Counsel's conversations with counsel for several third-party witnesses, Respondents have not made adequate efforts to finalize deposition dates and resolve any outstanding production issues with third parties, or such discussions are ongoing. Consequently, any delay in Respondents' ability to receive discovery from third parties in response to subpoenas is not attributable to Complaint Counsel and we do not believe provide sufficient ground for removing these witnesses.

We discuss each witness identified in your letter below.

a. KDMC

Complaint Counsel timely identified Autumn McFann of King's Daughters Medical Center on its original, December 11, 2015, Preliminary Witness List and Amended Preliminary Witness List of December 29. Both Complaint Counsel and Respondents learned in January, after preliminary witness lists were served, that Ms. McFann was seriously ill and could not appear for the depositions noticed by Respondents and Complaint Counsel. On January 21, Respondent informed Complaint Counsel that KDMC had designated Gregory Whitlock for deposition as its corporate representative. That same day, Complaint Counsel informed Respondents that, in light of these developments, Complaint Counsel planned to substitute Mr. Whitlock for Ms. McFann on our witness list if Ms. McFann's health did not improve, and we suggested that Respondents plan their deposition accordingly. The following day, Respondents responded: "we are amenable to the FTC replacing Ms. McFann with Mr. Whitlock on its witness list." Based on Ms. McFann's continued illness, we are willing to remove Ms. McFann

from our Final Witness List and only retain Mr. Whitlock on our Final Witness List per your January 22 email. If you no longer agree to this resolution, then we will keep both Ms. McFann and Mr. Whitlock on our Final Witness List (but will agree to remove Ms. McFann if Respondents are unable to depose her prior to trial due to her health issues).

Furthermore, with respect to Mr. Whitlock's testimony, Respondents had a full opportunity to question him and explore his knowledge at his deposition. Respondents' apparent view that Mr. Whitlock was not sufficiently able to answer certain questions as a corporate representative has no bearing on whether Complaint Counsel can call Mr. Whitlock to testify in his individual capacity at trial. And again, given your earlier agreement regarding the substitutability of Mr. Whitlock for Ms. McFann and that Respondents deposed Mr. Whitlock, it is unclear how Respondents were specifically prejudiced by his addition to our Final Witness List. On that basis, Complaint Counsel has insufficient information and will not remove Mr. Whitlock from its Final Witness List.

b. LifePoint

Complaint Counsel timely identified three LifePoint witnesses, including Mr. Gilbert and Mr. Reardon, on our original, December 11, 2015, Preliminary Witness List. We limited our Amended Preliminary Witness List to Mr. Gilbert, based on his personal knowledge of the relevant issues. On January 6, Respondents issued a subpoena for testimony to Mr. Gilbert in his individual capacity, a document subpoena and subpoena for testimony by a corporate representative of LifePoint, whom LifePoint subsequently identified as Mr. Reardon.

On February 12, Complaint Counsel learned from LifePoint (not Respondents) for the first time that LifePoint's counsel proposed Mr. Reardon as the corporate representative witness and that we both forgo a deposition of Mr. Gilbert because Mr. Reardon was more knowledgeable. Notably, we understand from LifePoint's counsel that Mr. Reardon was identified as the better witness to Respondents on February 6—before the close of fact discovery. On February 13, Complaint Counsel agreed to proceed with a deposition of Mr. Reardon and drop Mr. Gilbert from its witness list, if Respondents did not object to our inclusion of Mr. Reardon on our Final Witness List. Respondents failed to respond for 11 days. In the meantime, we submitted our Final Witness List with both Mr. Reardon's and Mr. Gilbert's names.

In a February 24 email, Respondent Cabell's counsel said it would forgo a deposition of Mr. Gilbert if he was removed from our Final Witness List. That same day, Complaint Counsel agreed to do so, as long as Respondents did not object to Mr. Reardon remaining on our Final Witness List, and LifePoint's counsel proposed five dates for the deposition of Mr. Reardon. Complaint Counsel responded that all of the dates were acceptable.

Even to date, Respondents have neither responded about proceeding with Mr. Reardon's deposition nor sought to take Mr. Reardon's (or Mr. Gilbert's) deposition. Instead, in a February 25 email, Respondent's counsel objected to addressing Mr. Reardon's status on our Final Witness List in connection with the Gilbert deposition and simply reiterated its request that we remove Mr. Gilbert from our Final Witness List. That same day, Complaint Counsel responded that we needed at least one LifePoint witness on our Final Witness List and that Respondents should proceed with the deposition of Mr. Reardon. Complaint Counsel continues to be

available for depositions of Mr. Reardon and Mr. Gilbert, if Respondents wish to proceed with them. Respondents' failure to schedule the deposition of any LifePoint witness precludes it from claiming prejudice in having Mr. Reardon appear on Complaint Counsel's Final Witness List.

In addition, we note that the documents produced by LifePoint were not limited to any particular custodian; indeed, many of the documents are Mr. Reardon's documents or documents on which he appears. Therefore, Respondents have not been prejudiced with respect to LifePoint's document production, and because Respondents have not scheduled a deposition of *any* LifePoint witness, cannot claim prejudice as to the substitution of Mr. Reardon for Mr. Gilbert. As a result, we continue to propose that, if Respondents agree, Complaint Counsel would remove Mr. Gilbert from our Final Witness List, leaving only Mr. Reardon on the Final Witness List, and both parties can depose Mr. Reardon. If Respondents do not agree, we will retain both witnesses on our Final Witness List and encourage Respondents to propose dates for the depositions of those two witnesses. We will make ourselves available for those depositions.

c. Thomas Health

We do not understand your objections as to Thomas Health, given that Complaint Counsel and Respondents jointly moved the Court to take discovery of Thomas Health after the close of fact discovery. The Court granted the motion on January 28, 2016, and both parties issued discovery requests on February 3. To our knowledge, Thomas Health has been responding to the parties' subpoenas with document productions and has had discussions with Respondents about deposition dates. We are not aware of any document production issues. Consequently, there is no basis to remove Thomas Health from Complaint Counsel's Final Witness List.

d. Energy Services

Complaint Counsel timely identified Mr. Donahoe on its December 11, 2015 Preliminary Witness List and our December 29 Amended Preliminary Witness List. Mr. Donahoe was originally scheduled for deposition on January 27, 2016. Counsel for Energy Services notified Complaint Counsel and Respondents a few days before the deposition that Mr. Donahoe was in the hospital. Mr. Donahoe was still in the hospital on the date of his deposition and was unable to sit for deposition. However, Mr. Donahoe has since left the hospital and is well enough to testify. To our knowledge, Respondents have not contacted Energy Services' counsel after Mr. Donahoe's original deposition date passed to determine whether he was out of the hospital and available to testify. Therefore, any claimed prejudice is not attributable to Complaint Counsel, and Respondents are free to contact Mr. Donahoe regarding potential deposition dates. We do not object to any deposition of Mr. Donahoe and will make ourselves available for such deposition.

e. United

Your assertion that Complaint Counsel should remove Cindy Winings from its Final Witness List is misplaced. Complaint Counsel timely identified Ms. Winings on its original, December 11 Preliminary Witness List and again on its Amended Preliminary Witness List and Final Witness List. Respondents issued subpoenas for testimony and documents on December

13, and deposed Ms. Winings on February 11. Respondents' concerns about Ms. Wining's testimony as a corporate representative pursuant to Rule 3.31c have no bearing on whether Complaint Counsel can call Ms. Winings to testify in her individual capacity at trial. Moreover, Complaint Counsel understands that discussions concerning additional discovery is ongoing between United's counsel and Respondents.

To summarize, as described above, Complaint Counsel is willing to modify the individual witnesses for KDMC and Lifepoint on our Final Witness List, but no other changes to our witness list are justified at this time.

We remain available to meet and confer on any of these issues.

Respectfully submitted,

/s/ *Alexis J. Gilman*
Alexis J. Gilman
Complaint Counsel

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Fwd: CHH-SMMC - Subpoena to LifePoint
Melissa Eakle Leasure
to:
tzurawski, llonergan
02/13/2016 03:39 PM
Hide Details
From: "Melissa Eakle Leasure" <mel@bcyon.com>
To: tzurawski@jonesday.com, llonergan@jonesday.com

See below

Sent from my iPhone

Begin forwarded message:

From: "Gilman, Alexis" <agilman@ftc.gov>
Date: February 13, 2016 at 2:55:25 PM EST
To: "Robert.McCann@dbr.com" <Robert.McCann@dbr.com>, "'mel@bcyon.com'" <mel@bcyon.com>
Cc: "Sheinberg, Samuel I." <SSHEINBERG@ftc.gov>
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 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
Drinker Biddle & Reath LLP
1500 K Street, N.W.
Washington, DC 20005-1209
(202) 230-5149 *office*
(202) 842-8465 *fax*
(301) 908-4324 *mobile*
Robert.McCann@dbr.com
www.drinkerbiddlehealthcare.com

Fwd: LifePoint Subpoena
Melissa Eakle Leasure
to:
tzurawski, llonergan
02/19/2016 08:22 PM
Hide Details
From: "Melissa Eakle Leasure" <mel@bcyon.com>
To: tzurawski@jonesday.com, llonergan@jonesday.com
History: This message has been forwarded.

FYI

Sent from my iPhone

Begin forwarded message:

From: "McCann, Robert W" <Robert.McCann@dbr.com>
Date: February 19, 2016 at 8:10:20 PM EST
To: Melissa Eakle Leasure <mel@bcyon.com>
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
BAILES, CRAIG & YON, PLLC
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(304) 697-4700 (phone)
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FW: LifePoint Subpoena
Melissa Eakle Leasure
to:
Tara Zurawski, Lindsey Lonergan
03/04/2016 01:00 PM
Hide Details
From: Melissa Eakle Leasure <mel@bcyon.com>
To: Tara Zurawski <tzurawski@jonesday.com>, Lindsey Lonergan <llonergan@jonesday.com>

I have not received a response to my email... Should I wait until Monday to follow up or send him an email today asking if he has availability for Gilbert?

From: Melissa Eakle Leasure [mailto: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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REDACTED

Notice of Electronic Service

I hereby certify that on March 11, 2016, I filed an electronic copy of the foregoing Respondents' Motion to Strike Witnesses from Complaint Counsel's Final Proposed Witness List (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 11, 2016, I served via E-Service an electronic copy of the foregoing Respondents' Motion to Strike Witnesses from Complaint Counsel's Final Proposed Witness List (Redacted), upon:

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