

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

---

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

---

**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

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

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

**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.  
a corporation;**

**and**

**St. Mary's Medical Center, Inc.  
a corporation.**

**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 "LifeP

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

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

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 (8<sup>th</sup> 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.





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

# 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';  
'JDreedy@edmentum.com'; 'Theodore@edmentum.com'; 'LJL@edmentum.com'; 'LJL@edmentum.com'

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

Regards,

Alexis

Alexis James Gilman

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

---

**From:** 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'; [knuttner@ionnesday.com](mailto:knuttner@ionnesday.com); 'Tara Zurawski'; [HRBrooks@foley.com](mailto:HRBrooks@foley.com)

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

Reardon should newly be included on a witness list two months after the amended witness list was

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

**Subject:** Re: McCann, Robert W.; Coffey, C. Patrick; McCann, Robert W.; Coffey, C. Patrick; McCann, Robert W.; Coffey, C. Patrick

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

---

As we have discussed, Complaint Counsel's request with respect to Lifepoint is focused, and it sounds like Mr. Bearden may be

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 Commission are not required to~~

Gilbert, we'll produce Mr. Gilbert. (If you want the original declarant, we'll produce him.) But we're not producing all three



# **ATTACHMENT B**

Gilman, Alexis

**From:** McCann, Robert W <Robert.McCann@dbr.com>  
**Sent:** Wednesday, February 24, 2016 9:38 PM  
**To:** ~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~

**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 amenable to Mr. Gilman's proposal, Mr. Boarder is available as follows:*

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

Public

remains on the FTC's witness list we have no choice but to depose him in order to effectively represent our client

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

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

<b>In the Matter of</b>	)	
	)	
	)	
<b>Cabell Huntington Hospital, Inc.</b>	)	<b>Docket No. 9366</b>
<b>a corporation;</b>	)	
	)	
<b>Pallottine Health Services, Inc.</b>	)	
<b>a corporation;</b>	)	
	)	
<b>and</b>	)	
	)	
<b>St. Mary's Medical Center, Inc.</b>	)	
<b>a corporation.</b>	)	
_____	)	

**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.

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  
Samuel I. Sheinberg  
Steve Vieux

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



**CERTIFICATE OF SERVICE**

I hereby certify that on March 11, 2016, I filed the foregr6E8g document electronically



James Bailes  
Bailes, Craig & Yon, PLLC  
401 10th Street, Suite 500  
Huntington, WV 25701  
tlc@bcyon.com  
jrb@bcyon.com  
(304) 697-4700

*Counsel for Respondent Cabell  
Huntington Hospital, Inc.*

**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