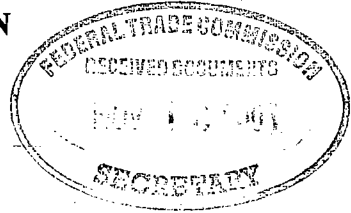
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of CALIFORNIA PACIFIC MEDICAL GROUP, INC., dba BROWN AND TOLAND MEDICAL GROUP, a corporation.	Docket No. 9306

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO EXTEND DISCOVERY AND HEARING DATE

INTRODUCTION

Complaint counsel oppose respondent California Pacific Medical Group, Inc.'s ("Brown and Toland") motion to extend the time for discovery and to delay the hearing date. The deadlines for discovery and the hearing date in the scheduling order issued by Your Honor already give both parties ample time to develop their evidence, and the respondent has failed to make an adequate showing to justify its requested extension.

The complaint alleges that competing Brown and Toland physicians collectively agreed on the rates at which they would sell their individual services,[1] and that Brown and Toland lacks any legitimate justification for this conduct.[2] Brown & Toland already has admitted the

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[1] *See Arizona v. Maricopa County Medical Society,* 457 U.S. 332 (1982)(condemning as per se illegal agreements among competing physicians to collectively set rates at which they sell their individual services).

[2] See *Polygram Holding, Inc.* ("Three Tenors"), FTC D. 9298 (July 2003) (in the absence of legally cognizable and economically plausible justifications, agreements on price between competitors are condemned).

underlying facts necessary to prove price fixing: (1) some of its affiliated physicians are in competition with one another;[3] (2) the physicians in its PPO network agreed to fees at or above specified rates;[4] and (3) Brown & Toland negotiated contracts with health plans on behalf of its physicians.[5] Because these facts are not in dispute, discovery on this issue is largely unnecessary. Additionally, Brown and Toland and its affiliated physicians control virtually all the evidence related to whether Brown and Toland has a legally cognizable and economically plausible justification for its conduct. As such, the existing discovery deadline has provided sufficient time for the parties to gather information relating to the claim of price fixing by competing Brown and Toland physicians and any justifications for that conduct. Moreover, further delay will harm consumers by allowing the Brown and Toland physicians to continue to charge higher prices for their services--prices which were set through illegally, collectively negotiated contracts. Accordingly, for the reasons stated below, we respectfully request that Your Honor deny Brown and Toland's motion to extend the discovery period and delay the hearing date.

ARGUMENT

I. Brown and Toland's Motion Should Be Denied Because It Fails to Establish the "Extraordinary Circumstances" Necessary to Affect This Court's Obligation to Render a Decision in One Year

Brown and Toland's request for a seven-week extension of the discovery period fails to take into account this Court's responsibility under section 3.51(a) of the FTC's Rules of Practice ("FTC rules"), which mandates that absent "extraordinary circumstances," the administrative law

3 Answer at ¶ 4.

4 Answer at ¶ 14.

5 Answer at ¶ 17.

judge shall file the decision no later than one year after the issuance of the complaint. Rather respondent's motion only cites to the language of section 3.21 of the FTC rules, which generally uses the "good cause" standard for granting extensions of time. Even section 3.21, however, reinforces the importance of the overall purpose of the Rules as being to conclude the proceedings in one year. Under section 3.21(c)(2), the administrative law judge "shall consider ... the need to conclude the evidentiary hearing and render an initial decision in a timely manner" when evaluating whether good cause exists for an extension of time. Accordingly, evaluation of whether good cause exists to justify extending discovery and the hearing date by seven weeks must include consideration of the ability of the Court to conclude the proceedings within the one year time frame dictated by section 3.51. Brown and Toland's motion fails to do so.

The Commission issued its complaint in this matter on July 9, 2003. This Court gave the parties until December 8 to complete discovery. Extending the discovery deadline by seven weeks would require extending all other deadlines by nearly the same amount. Accordingly, under Brown and Toland's proposed seven-week extension, the hearing, currently scheduled to begin March 2, would begin around April 20 and conclude in mid-May. That would leave less than two months in the one-year time frame for the parties to complete post-trial briefs and findings of fact, and for the Court to issue its decision. This is virtually impossible. Accordingly, Brown and Toland's proposed seven-week extension of the discovery period would most certainly prevent the parties and the Court from meeting their obligation to conclude the proceedings in one year.

Brown and Toland's request for an additional seven weeks for discovery also would cause the Brown & Toland hearing to overlap with the *Aspen Technology Inc.* ("*Aspen Tech*")

hearing. A seven-week extension, for completion of discovery and the subsequent deadline changes, would cause the hearing in this matter to begin in San Francisco on or about April 20, while the hearing in *Aspen Tech* currently is scheduled to begin in Washington D.C. on April 14. Brown and Toland's proposed seven-week extension for discovery thus could also compromise the Court's ability to render its decision in *Aspen Tech* within one year.

II. Brown and Toland's Motion Should Be Denied Because It Fails to Show Good Cause to Modify this Court's Scheduling Order

Brown and Toland does not show good cause why the Court should grant a seven-week extension of discovery and the hearing date. Contrary to its contention, Brown and Toland has not diligently pursued discovery in several ways.

First, Brown and Toland admits in its motion that at the time it filed the motion for an extension of time, it had not issued any subpoenas *ad testificandum* to the individuals it now says it wants to depose. Second, after complaint counsel requested depositions of the individuals listed on Brown and Toland's witness list, Brown and Toland negotiated the schedule that now runs into December. Brown and Toland should not now be able to use its decision to push back the depositions of its witnesses until late in the discovery period as a basis for not having enough time to complete its own discovery.

Third, Brown and Toland chose to rely on complaint counsel's subpoenas *duces tecum* to third parties rather than undertake its own third-party discovery. Brown and Toland did this by issuing identical subpoenas *duces tecum* to third parties and informing them, essentially, that

Brown and Toland would accept the third parties' production to complaint counsel as adequate.[6] Brown and Toland should not now be allowed to assert that its decision makes it difficult for it to depose third-party witnesses effectively before December 8. Moreover, while Brown and Toland is correct that the deadline for one health plan to complete its response to the subpoena *duces tecum* is December 1, Brown & Toland fails to mention that many health plans completed their subpoena responses in October. Thus, Brown and Toland should not receive a seven-week extension to complete work it did not even attempt to undertake on its own.

Finally, Brown and Toland will not suffer undue prejudice if the court does not grant the seven-week extension. Brown and Toland's own physician and management witnesses and some health plan witnesses possess whatever information there may be to defend itself against the FTC's price-fixing allegations.

CONCLUSION

As the moving party, Brown and Toland has not carried its burden to demonstrate that it diligently pursued discovery so that "good cause" exists to extend the deadlines, much less the "extraordinary circumstances" necessary to justify an extension in the one-year period for

6 Attached as Exhibit A is a true and correct copy of Brown and Toland's letter to Aetna, Inc. that Brown and Toland provided to complaint counsel. This letter is representative of the letters that Brown and Toland sent with its subpoenas *duces tecum* to other third parties.

administrative litigation, as required by the interplay between Rules 3.21 and 3.51. Accordingly, we respectfully request that the Court deny Brown and Toland's motion for a seven-week extension of the discovery period and the consequent delay of the hearing date.

Respectfully submitted,

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Dated: November 14, 2003

CERTIFICATE OF SERVICE

I, Brian P. Beall hereby certify that on 14 November 2003, I caused a copy of Complaint Counsel's Opposition to Respondent's Motion to Extend Discovery and Hearing Date to be served upon the following:

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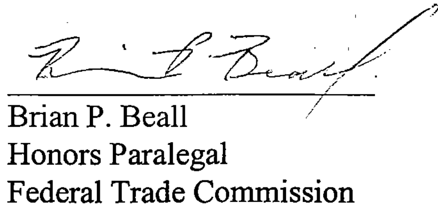

Brian P. Beall
Honors Paralegal
Federal Trade Commission