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**

MOTION TO EXTEND DISCOVERY AND THE HEARING DATE

Pursuant to Rule 3.21(c)(2) of the Federal Trade Commission's Rules of Practice, Respondent California Pacific Medical Group, Inc., d/b/a Brown & Toland Medical Group (hereinafter "Brown & Toland"), hereby moves the Court for an order extending the close of fact discovery and the hearing date by seven weeks. As set forth below, good cause exists for these extensions because, despite Brown & Toland's best efforts, Brown & Toland cannot complete the discovery it needs to defend itself within the current schedule. Brown & Toland's motion should therefore be granted to ensure its right to a full and fair hearing.

I. LEGAL STANDARD

Rule 3.21(c)(2) provides:

> The Administrative Law Judge may grant a motion to extend any deadline or time specified in th[e] scheduling order only upon a showing of good cause. Such motion shall set forth the total period of extensions, if any, previously obtained by the moving party. In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner. The Administrative Law Judge shall not rule on *ex parte* motions

to extend the deadlines specified in the scheduling order or modify such deadlines solely upon stipulation or agreement of counsel.

While there are no reported decisions discussing Rule 3.21(c)(2)'s good cause requirement, Rule 16(b) of the Federal Rules of Civil Procedure applies an identical standard.[1] Under Rule 16(b), good cause exists when the scheduling order "cannot be reasonably met despite the diligence of the party seeking the extension." Fed. R. Civ. P. 16 1983 advisory committee notes; see also Carnrite v. Grandada Hosp. Group, Inc., 175 F.R.D. 439, 446 (W.D.N.Y 1997) (good cause to extend a scheduling order means "that scheduling deadlines cannot be met despite a party's diligence").

II. PROCEEDINGS TO DATE

The Commission commenced this action on July 8, 2003. Brown & Toland answered the complaint on August 5, 2003, and the initial scheduling conference was held on August 19, 2003. Following that conference, the Court issued the Scheduling Order, which set, inter alia, (i) a November 25, 2003, deadline for issuing written discovery other than for authentication purposes; (ii) a December 8, 2003, close of fact discovery; and (iii) a March 2, 2004, hearing date.

As outlined briefly below, although Complaint Counsel and Brown & Toland have endeavored to comply with this schedule, it is now apparent that discovery cannot be completed by December 8, 2003.

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[1] Rule 16(b) provides: "A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge."

Since the commencement of this case, Brown & Toland has collected, reviewed, and produced over 100,000 pages of documents in response to Complaint Counsel's first request for the production of documents and things. Brown & Toland has substantially completed its response to this set of requests.[2] In October, Complaint Counsel noticed 24 Brown & Toland physicians and employees for depositions. Brown & Toland has worked diligently to schedule the depositions requested by Complaint Counsel within the discovery period. Four of the depositions have been taken, and the remainder are scheduled to occur prior to the December 8, 2003 close of discovery. Brown & Toland has therefore worked diligently to ensure that the discovery requested by Complaint Counsel be completed prior to the December 8, 2003 deadline.

Brown & Toland has subpoenaed individuals identified in Complaint Counsel's initial witness list. The return dates on those subpoenas are before the December 8, 2003 close of discovery, although the subpoenaed individuals have not yet agreed that they can and will appear on the dates requested.

However, both parties have recognized that this case also requires significant discovery from non-parties. In fact, Complaint Counsel issued 51 document subpoenas to non-parties, predominantly (i) Brown & Toland physicians, (ii) health insurers, and (iii) Brown & Toland's competitors. Brown & Toland issued follow-up subpoenas to several of the payors from which Complaint Counsel subpoenaed documents.[3] Brown & Toland will shortly subpoena testimony

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[2] Complaint Counsel has also completed its response to Brown & Toland's first set of document requests and Brown & Toland's first set of interrogatories. Thus, there are no outstanding discovery requests between the parties.

[3] That is, Brown & Toland issued a subpoena to ensure that documents relevant to its defense are not omitted from the response to Complaint Counsel's subpoena.

from many of these persons and institutions, in particular health insurers; however, Complaint Counsel recently stated that they anticipate the responses to their non-party subpoenas will not be completed until December 1, 2003. Given the volume of documents expected to be produced, it will simply be infeasible to complete these depositions prior to December 8, 2003, particularly in light of the need to accommodate non-parties' schedules during the holiday season.[4]

III. ARGUMENT

An extension of the discovery period is plainly warranted under Rule 3.21(c)(2). First, it is evident that the current discovery deadline cannot be met, despite the parties' diligent efforts. Thus, good cause to extend discovery exists. See supra Part I. Second, no prior extension of the Scheduling Order has been granted. Finally, this administrative action has been pending for under four months, and the requested extension will not preclude a timely initial decision. In short, this is precisely the type of circumstance contemplated by Rule 3.21(c)(2).

Furthermore, no prejudice will result from extending the discovery cut-off and the hearing date. To the contrary, Brown & Toland's defense of this matter will be severely handicapped if the deadlines are not extended. This matter focuses in large part on two issues: (1) the extent to which Brown & Toland possesses sufficient "clinical integration" to merit joint

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[4] The proposal to extend the cut-off for fact discovery to January 30, 2004 takes into account the limits to which burdens can realistically be imposed upon non-parties. Notwithstanding the parties' best efforts, it is unlikely that non-parties will be available for depositions during the week of Thanksgiving or between Friday, December 19, 2003 and Monday January 5, 2004 (due to the Christmas and New Years holidays). Accordingly, the seven week enlargement of the discovery schedule proposed in the motion equates – as a practical matter – to approximately four weeks of additional time for fact discovery.

negotiations of health insurer contracts; and (2) whether Brown & Toland's negotiated PPO contracts with health insurers have had anticompetitive effects in the marketplace. Third party documents and testimony are critical to both of these issues. Health insurers that negotiate contracts with a number of physician groups (including Brown & Toland), for instance, will likely possess relevant information concerning comparative cost savings associated with Brown & Toland's clinical activities (such as its credentialing and utilization review). This information is necessary to rebut Complaint Counsel's claim that "[t]he Brown & Toland network physicians have not integrated their practices through the PPO network in any significant respect." FTC Complaint at ¶ 12. Moreover, insurers, as well as competing physician groups, will likely have information concerning how Brown & Toland's PPO rates compare to those negotiated by competitors. This information is necessary to rebut Complaint Counsel's claim that insurers "compensate Brown & Toland network physicians at a higher rate than they would have compensated them absent the conduct." FTC Complaint at ¶ 21. Allowing for the discovery of this information will ensure that the record in this matter is fully developed and fair.

In light of the foregoing, Brown & Toland respectfully requests that the close of fact discovery be extended from December 8, 2003 to January 30, 2004, and that subsequent dates on the Scheduling Order be modified accordingly.[5]

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[5] Complaint Counsel has authorized Brown & Toland to represent to the Court that they will agree to a four-day extension of the fact discovery period, and a four-day extension of the deadline for filing motions for summary decision. Brown & Toland requests that the Court convene a telephone conference concerning this motion, after which a proposed Amended Scheduling Order will be submitted for the Court's consideration.

Respectfully submitted November 4, 2003 by:

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2003 I caused to be served by Federal Express a copy of Respondent Brown & Toland's Motion to Extend Discovery and the Hearing Date upon:

The Honorable Stephen J. McGuire
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