

ORIGINAL



UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Jon Leibowitz, Chairman  
Pamela Jones Harbour  
William E. Kovacic  
J. Thomas Rosch

---

**Investigation of the Proposed  
Acquisition by MaineHealth of  
Maine Cardiology Associates and  
Cardiovascular Consultants of Maine, P.A.**

---

**File No. 101-0010**

**JOINT PETITION TO LIMIT COMPULSORY PROCESS**

*Introduction*

On Monday, January 25, 2010 Cardiovascular Consultants of Maine (“CCM”) and Maine Cardiology Associates (“MCA”) (collectively referred to as “the Respondents”) each received a subpoena and a Civil Investigative Demand (“CID”) from the Federal Trade Commission (“FTC”). Both the subpoena and the CID demanded that all documents and information responsive to the FTC’s demands for information be provided to the FTC by February 10, 2010 – a mere sixteen days after the receipt of each.<sup>1</sup> As it was impossible to comply with the specified return date, and because, as drafted, the requested information imposes an overwhelming and unfair burden on the Respondents we have proposed limitations on the records to be searched and the information to be provided. Failure to limit the scope of the subpoena and CID is unreasonable, given the enormous and unfair burden in terms of the cost and effort required in comparison to the incremental value of the information relative to that which will be turned over. Indeed, if left unmodified, the costs of production would likely

---

<sup>1</sup> Both the CID and subpoena were issued on January 22, 2010 but received by the Respondents on or after January 25, 2010.

exceed the value of the transaction. If our proposed substantive limitations are accepted, we request that the return date be changed from to April 15, 2010. If, however, our proposal is not accepted, at this time we have no way of making a reasonable estimate of the time we could complete response.

In any event, the Respondents commit to producing information on a rolling basis as it becomes available. Indeed, in response to the subpoena, last week Respondents produced to the FTC staff all of the data and information that has been produced to the Maine Department of Attorney General and the Maine Governor's Office of Health Policy & Finance in connection with the regulatory approval process regarding the proposed transaction identified in the FTC's demands for compulsory process. (Responsive to Subpoena Specification #8).

***Respondents Have Made A Good Faith Proposal to the Staff***

With respect to our proposed limitations on the scope of FTC's substantive demands for information our proposals remain consistent with the proposals included in our letter to the FTC Staff which we provided on February 5, 2010 after a teleconference with the staff on February 4, 2010. That letter is attached as Exhibit A. As stated in that letter we asked our clients if they would be willing to provide a narrative response to Specification 4, 5 and 6 of the CID and they stated that they would be willing to do so as long as any responses could be completed from existing information and did not require additional research or investigation.

In response to our letter, FTC staff (Nancy Park) requested an additional call to resolve remaining issues for the two cardiology groups. That call was scheduled for Monday February 8, 2010. In a letter on February 5, 2010, the FTC staff indicated that they "expected to be able to offer meaningful modifications to these subpoenas that will lessen the burden of responding while at the same time ensuring that the Commission staff is able to obtain the information

necessary to conduct its investigation.” Notably, however, the FTC letter did not extend the deadline for responding the subpoenas or CIDs. In addition, the FTC letter raised issues with counsel’s proposal for CID specifications 4, 5 and 6. Counsel responded to that correspondence indicating that counsel believed that the FTC staff had misstated or misunderstood Respondents’ position, but that counsel would be happy to discuss in the call on February 8, 2010. In fact, counsel had stated that we would be willing to ask our clients whether they would be willing to provide narrative response to CID specifications 4, 5, and 6, and they have both indicated that they would so long as they were not required to perform additional research or investigations in order to provide their narrative responses. Unfortunately, the call to resolve these issues never occurred; despite Respondents’ counsel repeated efforts to schedule such a call (see Respondents’ statement of good faith).

***The Subpoena and Civil Investigative Demand are Overly Burdensome***

There can be no doubt that, as drafted and served, the FTC demands for documents and other information could not possibly be satisfied by the return date, which initially was February 10, 2010, but was extended until Feb 12, 2010.<sup>2</sup> The applicable statute requires, in pertinent part, that each CID for the production of documentary material “will provide a reasonable period of time within which the material so demanded may be assembled and made available for . . . copying or reproduction . . .” 15 U.S.C. § 57b-1(c)(3)(B). Even a cursory glance at the CID and subpoena served on Respondents will reveal that the current February 12, 2010 deadline imposed is beyond impossible.

---

<sup>2</sup> Counsel for CCM and MCA had a conference call scheduled with FTC staff on Monday February 9, 2010. Given the inclement weather, the FTC staff did not join that call. For that reason, counsel emailed the Director, the Deputy Director and the Assistant Director requesting an extension to file this petition. Deputy Director Norman Armstrong gave Respondents until February 12, 2010 to file this petition. (See Exhibit B).

the proposed transaction would be only temporary because Mercy Hospital, located in Portland, has now announced that it plans to employ its own cardiologists to perform cardiology procedures at Mercy. Any of the cardiologists to be employed by MaineHealth would remain fair game for employment in the Mercy Group because none of the employment contracts between MaineHealth and the cardiologists would contain non-compete clauses.

It also should be noted that there is not currently any price competition in the market for cardiology services between the two groups. Specifically, the groups report that managed care plans do not attempt to play the groups off against each other. One group currently accepts the default rate offered by managed care organizations, and the other group has its contracts negotiated by an organization that negotiates for several different (non-competing) groups of physicians. Moreover, consumer welfare in the market for cardiology services, the reason to be concerned with a reduction in competition in this market, is unlikely to be adversely affected.

The price of cardiology services is unlikely to increase because, under the terms of the Application for the Certificate of Public Advantage (COPA) filed with the State on February 8, 2010 the cardiologists to be employed by MaineHealth will accept the default rates offered by managed care organizations for cardiology services. More importantly, the output for cardiology services is actually likely to increase because, under the terms of the COPA Application, MaineHealth has committed to continue providing cardiology services in outlying areas, and to provide services to all potential patients, regardless of their ability to pay. If the groups were to remain independent it is unlikely that the same level of services could continue to be provided.

Significantly, the transaction will only occur if the State grants the COPA. Thus,

if the State refuses to grant the COPA there can be no violation of the antitrust laws. On the other hand, if the State grants the COPA the transaction would be immune from the operation of the antitrust laws by virtue of the State Action Exception. The existence of the COPA statute, 22 M.R.S.A. §§ 1841 *et seq.*, is, by itself, sufficient to demonstrate an affirmative State policy to substitute regulatory solutions for the unfettered operation of the market, and there can be little doubt that the continuing regulatory oversight of the State, *inter alia*, with the pricing of cardiology services and the continued provision of those services in all existing locations without regard to the ability to pay is sufficient to demonstrate active State supervision.<sup>3</sup>

For the reasons set forth above, we request that the subpoena and CID for each group be limited as described above.

Respectfully submitted  
February 12, 2010

Counsel for Respondents  
Cardiovascular Consultants of Maine  
Maine Cardiology Associates

  
William G. Kopit  
Epstein Becker & Green, P.C.  
1227 25<sup>th</sup> Street NW  
Washington D.C., 20037  
(202) 861-1803

---

<sup>3</sup> The Maine statute contains the following legislative finding: "The Legislature finds that it is necessary and appropriate to encourage hospitals and other health care providers to cooperate and enter into agreements that will facilitate cost containment, improve quality of care and increase access to health care services. This Act provides processes for state review of overall public benefit, for approval through certificates of public advantage and for continuing supervision. It is the intent of the Legislature that a certificate of public advantage approved under this chapter provide state action immunity under applicable federal antitrust laws. 22 M.R.S.A. §1842.



**EPSTEIN BECKER & GREEN, P.C.**

ATTORNEYS AT LAW

1227 25TH STREET, NW, SUITE 700  
WASHINGTON, DC 20037-1175  
202.861.0900  
FAX: 202.296.2882  
EBGLAW.COM

WILLIAM G. KOPIT  
TEL: 202.861.1803  
FAX: 202.296.2882  
WKOPIT@EBGLAW.COM

February 5, 2010

**VIA ELECTRONIC MAIL**

Nancy Park  
Federal Trade Commission  
601 New Jersey Ave., N.W.  
Washington, D.C. 20001

Re: Request for an extension of time on the response to the subpoena and CID issued to Cardiovascular Consultants of Maine and Maine Cardiovascular Associates

---

Dear Nancy:

This letter memorializes our discussion and agreement of yesterday. As we discussed, Cardiovascular Consultants of Maine ("CCM") and Maine Cardiovascular Associates ("MCA") have agreed to provide the information you requested that exists in their files, including data contained in their current operational systems. Both groups recently changed electronic systems. CCM changed systems in November of 2008 and MCA changed systems in November of 2007. Our understanding is that neither group can electronically access material in prior operating systems, and, for that reason, they do not want to be required to access that information manually, as that would be exceedingly burdensome.

While neither wished to be required to respond to CID specifications to the extent those specifications requested narrative discussions of certain market conditions (Specifications 4, 5 and 6 of the Civil Investigative Demand) we agreed to ask the groups if they would be willing to provide such narratives to the extent the specifications can be addressed without further investigation and/or research.

As we also discussed, both groups would like to request an extension of time to provide that material, and would like to further discuss with you the manner in which the materials will be produced. We would also like to work with you so that we can perform electronic searches of the information in order to provide the information to you more expeditiously.

ATLANTA • BOSTON • CHICAGO • HOUSTON • LOS ANGELES • MIAMI  
NEWARK • NEW YORK • SAN FRANCISCO • STAMFORD • WASHINGTON, DC

EPSTEIN BECKER GREEN WICKLIFF & HALL, P.C. IN TEXAS ONLY.

Our understanding was that you would be amenable to such an extension and to such further discussions, provided that we give to you a list of physicians and/or managers at CCM and MCA who are most likely to have information that is of greatest interest to you with a commitment of a schedule for production from those individuals, and to the extent necessary, from other individuals in the organizations.

Through this letter we are providing you that list of individuals. Once you agree to the list of individuals, we can assess the volume (in paper and in gigabytes) from those individuals that we would need to review to provide you with the information. We also are working to determine the total volume of electronic information that would have to be culled. Until we come to an agreement on the manner of production, and until we know the total volume of information, it is premature for us to establish a date by when such materials would be produced.<sup>1</sup> It would be our goal to get you the information from the individuals listed below, in at least some format, by March 1<sup>st</sup>. It may be that once we know the total volume, and the manner in which these documents can be produced, that we would have that information, in the appropriate format, to you before that time.

The key individuals for each group are:

For Maine Cardiology Associates

1. Karl Sze, M.D.
2. Mary Polito, Practice Manager
3. Aaron Bishop, Controller,
4. Other Cardiology Integration Steering Committee Members
  - a) Marco Diaz, M.D.
  - b) Jennifer Hillstrom,
  - c) Joseph Wight, M.D.

For Cardiovascular Consultants of Maine

1. William Dietz, M.D.
2. April Donovan, Practice Manager;
3. Other Cardiology Integration Steering Committee Members

---

<sup>1</sup> As you know, the volume of electronic information can be highly unpredictable, particularly when that volume extends over several years. For example, if each individual in a particular group had a gigabyte of information in emails, and we were required to do a manual review of each document, the review, in total, could well take 2083 hours. (Assuming that there are five custodians to review, each gigabyte of emails is equal to 100,000 pages, and that each page could be reviewed in 15 seconds). Obviously, using electronic or other search methods to cull the documents before review would save time in review, but would take time in developing searches and getting the information into the appropriate format for searching.

Nancy Park  
February 5, 2010  
Page 3

- a) John Love, M.D.;
- b) Edward Teufel, M.D
- c) John Moloney, M.D.

Pursuant to our discussion of yesterday, it is our understanding that the above outlines the agreement reached and provides you with the information requested and therefore that you will agree to the extension of time. Please confirm your agreement with that in writing.

Finally, as you know, in any discovery process there may be unexpected events that cause the parties unavoidable delays or inordinate expenses to obtain the information requested. We therefore further ask that if either CCM or MCA finds that the production of any information leads to an unavoidable delay or an inordinate expense, that you would be willing to work through those issues and concerns with us.

Very truly yours,

  
William G. Kopit



**Patricia Wagner**

---

**From:** Armstrong, Norman [NARMSTRONG@ftc.gov]  
**Sent:** Monday, February 08, 2010 4:30 PM  
**To:** William Kopit; Reilly, Matthew J.; Feinstein, Richard  
**Cc:** Patricia Wagner  
**Subject:** RE: Emergency Request for Extension

Mr. Kopit,

Thank you for your email. Based on your email, we will extend the time to file a petition to limit or quash the subpoenas and Civil Investigative Demands issued to Maine Health, Cardiovascular Consultants of Maine and Maine Cardiology Associates until Friday, February 12, 2010.

Regards,  
 Norm

---

**From:** William Kopit [mailto:WKopit@ebglaw.com]  
**Sent:** Monday, February 08, 2010 3:38 PM  
**To:** Reilly, Matthew J.; Feinstein, Richard; Armstrong, Norman  
**Cc:** Patricia Wagner  
**Subject:** Emergency Request for Extension

On behalf of our clients, MaineHealth, Cardiovascular Consultants of Maine ("CCM"), and Maine Cardiology Associates ("MCA") and pursuant to 16 CFR 2.7(d)(3), we are requesting an emergency extension of time to file a petition to limit or quash a subpoena and Civil Investigative Demand. Pursuant to 16 CFR 2.7(d), any petition to limit or quash must be filed prior to the response date of the subpoena and CID; and requests for an extension of time to file those petitions may be granted only by the Bureau Director, the Deputy Director, and the Assistant Director.

MaineHealth, CCM and MCA each received a subpoena and Civil Investigative Demand on January 25, 2010. The response time listed on each subpoena and CID was February 10, 2010. Since that time, we have met with the FTC staff and had phone conversations with the FTC staff to try to come to an agreement on limitations and timing for production. We had scheduled another such call for today, February 8, 2010. However, due to the inclement weather, the staff was unable to participate in that call. (We understand that the storm has produced significant power outages across the region). Staff had requested, through voice mail, that a call be scheduled for Tuesday, February 9, 2010. Unfortunately, I am scheduled to be traveling tomorrow; and the deadline for filing such a petition is tomorrow.

For MCA and CCM, we believe that most if not all of the few remaining issues can be resolved by an additional phone call. We remain committed to trying to reach a reasonable alternative for MaineHealth, and believe that further discussions may at least limit the scope of any petition filed.

For these reasons, and the uncertainty of the weather this week, we request an extension to file a petition to limit or quash the subpoenas and Civil Investigative Demands until February 16, 2010.

**WILLIAM KOPIT | [BIO](#)**  
 (202) 861-1803 (DIRECT) | (202) 861-3551 (FAX)  
 WKOPIT@EBGLAW.COM

**EPSTEINBECKERGREEN**  
 1227 25TH STREET, NW | WASHINGTON, DC 20037

2/11/2010

(202) 861-0900 (MAIN) | [WWW.EBGLAW.COM](http://WWW.EBGLAW.COM)

*Think Green. Please consider the environment before you print this message. Thank you.*

---

CONFIDENTIALITY NOTE: This e-mail is intended only for the person or entity to which it is addressed and may contain information that is privileged, confidential or otherwise protected from disclosure. Dissemination, distribution or copying of this e-mail or the information herein by anyone other than the intended recipient, or an employee or agent responsible for delivering the message to the intended recipient, is prohibited. If you have received this e-mail in error, please call the Help Desk of Epstein Becker & Green, P.C. at (212) 351-4701 and destroy the original message and all copies.

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

Pursuant to the CAN-SPAM Act this communication may be considered an advertisement or solicitation. If you would prefer not to receive future marketing and promotional mailings, please submit your request via email to [ebgus@ebglaw.com](mailto:ebgus@ebglaw.com) or via postal mail to Epstein Becker & Green, P.C. Attn: Marketing Department, 250 Park Avenue, New York, NY 10177. Be sure to include your email address if submitting your request via postal mail. EBGST041706

---

2/11/2010

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Jon Leibowitz, Chairman  
Pamela Jones Harbour  
William E. Kovacic  
J. Thomas Rosch

---

**Investigation of the Proposed  
Acquisition by MaineHealth of  
Maine Cardiology Associates and  
Cardiovascular Consultants of Maine, P.A.**

---

**File No. 101-0010**

**Statement of Good Faith**

Pursuant to 16 C.F.R. § 2.7(d)(2), counsel for Respondents Cardiovascular Consultants of Maine (“CCM”) and Maine Cardiology Associates (“MCA”) provide the following statement in support of counsel’s representation of attempting, in good faith, to resolve by agreement the issues raised by the petition and has been unable to come to an agreement on these issues.

Specifically, counsel for Respondents met with the FTC staff on February 2, 2010 to discuss the issues surrounding the FTC’s investigation. While the bulk of that meeting addressed issues more specific to MaineHealth, at that meeting counsel for Respondents requested time for a meeting later in that week. Attending that meeting for the FTC were staff members Samuel Sheinberg, Nancy Park and Paul Nolan, as well as two FTC economists. Counsel for Respondent at the meeting were William Kopit and Patricia Wagner.

On Thursday, February 4, 2010 counsel had a conference call with the FTC staff to address specific concerns of CCM and MCA regarding the scope of production. Attendees on the call were the same as at the meeting on February 2<sup>nd</sup>. In that call, the FTC staff and counsel

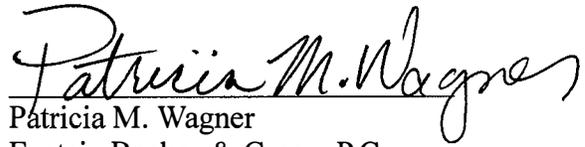
for Respondents came to agreement on many issues. FTC staff requested that counsel for respondent memorialize the conversation in a letter. On Friday February 5, 2010, counsel for Respondents sent the FTC staff a letter detailing the conversation of February 4<sup>th</sup>. Later that day, counsel for Respondent received correspondence from the FTC which commented on counsel's proposal. In that letter, the FTC staff indicated that they were willing to work with counsel to come to an agreement. In response to our letter, FTC staff (Nancy Park) requested an additional call to resolve remaining issues for the two cardiology groups. That call was scheduled for Monday February 8, 2010. Notably, however, the FTC letter of Feb 5, 2010 did not extend the deadline for responding the subpoena or CID. In addition, the FTC letter raised issues with counsel's proposal for CID specifications 4, 5 and 6. Counsel responded to that correspondence indicating that counsel believed that the FTC staff had misstated or misunderstood Respondent's position, but that counsel would be happy to discuss in the call on February 8, 2010. In fact, Counsel had stated that we would be willing to ask our clients whether they would be willing to provide narrative response to CID specifications 4, 5, and 6, and since that time they have both indicated that they would so as long as they were not required to perform additional research or investigations in order to provide their narrative responses.

Early Monday morning, February 8, 2010, counsel for Respondent received a call from FTC staff (Nancy Park) indicating that the staff would be unable to participate in the conference call given the weather which had forced a closing of the Federal government. By e-mail to the FTC staff counsel for Respondent (Patricia Wagner) offered to continue with the conference call using a call in number, and counsel (William Kopit and Patricia Wagner) dialed in to the number in case the staff was able to attend the call. The staff did not join.

On Monday February 8, 2010 counsel for Respondent (William Kopit) also sent a request

### CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of February 2010, I caused the original and twelve (12) copies of Petition to Limit with attached Exhibits to be filed by hand delivery with the Secretary of The Federal Trade Commission, 601 New Jersey Avenue, N.W., Washington, D.C., 20580; and three (3) copies of same to be filed by hand delivery with Nancy Park, Esq., Attorney, Bureau of Competition, Federal Trade Commission, 601 New Jersey Avenue, N.W., Washington, D.C., 20580

  
Patricia M. Wagner  
Epstein Becker & Green, P.C.  
1227 25<sup>th</sup> Street NW  
Washington D.C., 20037  
(202) 861-4182