

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Timothy J. Muris, Chairman**
 Mozelle W. Thompson
 Orson Swindle
 Thomas B. Leary
 Pamela Jones Harbour

In the Matter of

**CALIFORNIA PACIFIC MEDICAL GROUP, INC., dba
BROWN AND TOLAND MEDICAL GROUP,**

a corporation.

Docket No. 9306

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having heretofore issued its Complaint charging California Pacific Medical Group, Inc., dba Brown and Toland Medical Group, a corporation, hereinafter sometimes referred to as “Respondent,” with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of the Commission’s Rules, 16 C.F.R. § 3.25(c), and the Commission having considered the matter and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 3.25(f), 16 C.F.R. § 3.25(f) the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent California Pacific Medical Group, Inc., dba Brown and Toland Medical Group, is a for profit professional medical corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal address located at 153 Townsend, San Francisco, California 94107.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Respondent Brown & Toland” means California Pacific Medical Group, Inc., dba Brown and Toland Medical Group, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Payor” means any person that pays, or arranges for the payment, for all or any part of any physician services for itself or for any other person. Payor includes any person that develops, sells, or leases access to networks of physicians.
- C. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- D. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- E. “Participate” in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This definition applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”
- F. “Preexisting contract” means a contract that is in effect on the date this Order becomes final.
- G. “Principal Address” means either (1) primary business address, if there is a business, or (2) primary residential address, if there is no business address.

- H. “Qualified risk-sharing joint arrangement” means an arrangement to provide physician services in which:
1. all physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians to jointly control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:
 - a. the provision of physician services to payors at a capitated rate,
 - b. the provision of physician services for a predetermined percentage of premium or revenue from payors,
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals, or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient’s condition, the choice, complexity, or length of treatment, or other factors; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the arrangement.
- I. “Qualified clinically-integrated joint arrangement” means an arrangement to provide physician services in which:
1. all physicians who participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, these physicians, in order to control costs and ensure the quality of services provided through the arrangement; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

II.

IT IS FURTHER ORDERED that Respondent Brown & Toland, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians:
 - 1. to negotiate on behalf of any physician with any payor;
 - 2. to deal, refuse to deal, or threaten to refuse to deal with any payor;
 - 3. regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or
 - 4. not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent Brown & Toland;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician’s willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal;
- C. Attempting to engage in any action prohibited by Paragraph II.A. or II.B. above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A-II.C. above.

PROVIDED, HOWEVER, that nothing in Paragraph II shall prohibit any agreement involving, or conduct by, Respondent Brown & Toland that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement. In any proceeding to enforce this Order, Respondent Brown & Toland shall bear the burden of proof with regard to demonstrating that the challenged agreement or conduct is reasonably necessary to any formation, participation, or action.

III.

IT IS FURTHER ORDERED that, for a period of five (5) years after the date this Order becomes final, Respondent Brown & Toland shall notify the Secretary of the Commission in writing (“Notification”) at least sixty (60) days prior to entering into any arrangement with any

physicians under which Respondent Brown & Toland would act as a messenger, or as an agent on behalf of any physicians for any qualified risk-sharing joint arrangement, with payors regarding contracts or terms of dealing involving the physicians and payors, except for those contracts under which Respondent Brown & Toland is, or will be, paid a capitated (per member per month) rate by the payor. The Notification shall include the identity of each proposed physician participant; the proposed geographic area of operation; a copy of any proposed physician participation agreement; a description of the proposed arrangement's purpose and function; a description of any resulting efficiencies expected to be obtained through the arrangement; and a description of procedures to be implemented to limit possible anticompetitive effects, such as those prohibited by this Order. Receipt by the Commission from Respondent Brown & Toland of any Notification, pursuant to Paragraph III of this Order, is not to be construed as a determination by the Commission that any action described in such notification does or does not violate this Order or any law enforced by the Commission.

IV.

IT IS FURTHER ORDERED that Respondent Brown & Toland shall:

- A. For five (5) years after the date this Order becomes final, pursuant to each qualified clinically-integrated joint arrangement with any physician in which Respondent Brown & Toland is a participant ("Arrangement"), notify the Secretary of the Commission in writing ("Notification") at least sixty (60) days prior to Respondent Brown & Toland contacting a payor, pursuant to an Arrangement to negotiate or enter into any agreement relating to price or other terms or conditions of dealing with any payor, on behalf of any physician in such Arrangement.

PROVIDED, HOWEVER, that Notification shall not be required for subsequent contacts with any payors pursuant to any Arrangement for which Notification has been given pursuant to this Paragraph IV.A.

- B. With respect to any Arrangement, Respondent Brown & Toland shall include the following information in the Notification:
1. for each physician participant, the name, address, telephone number, medical specialty, medical practice group, if applicable, and the name of each hospital where he or she has privileges;
 2. a description of the Arrangement and its purpose, function, and geographic area of operation;
 3. a description of the nature and extent of the integration and the efficiencies resulting from the Arrangement;
 4. if the Arrangement in any way restricts the ability, or facilitates the refusal, of

physicians who participate in it to deal with payors on an individual basis or through any other arrangement, an explanation of the relationship of that restriction or facilitation to the efficiencies resulting from the Arrangement.

5. an explanation of how any agreement on prices (or on contract terms related to price) furthers the integration and achieves the efficiencies of the Arrangement;
 6. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Arrangement or its activities; and
 7. all studies, analyses, and reports that were prepared for the purpose of evaluating or analyzing competition for physician or hospital services in any area, including, but not limited to, the market share of physician services in any area or the market share of hospital services in any area.
- C. If, within sixty (60) days from the Commission's receipt of the Notification, a representative of the Commission makes a written request for additional information to Respondent Brown & Toland, Respondent Brown & Toland shall not engage in any conduct described in Paragraph IV.A. of this Order prior to the expiration of thirty (30) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition. The expiration of any waiting period described herein without a request for additional information or without the initiation of an enforcement proceeding shall not be construed as a determination by the Commission, or its staff, that a violation of the law, or of this Order, may not have occurred. Further, receipt by the Commission from Respondent Brown & Toland of any Notification of an Arrangement is not to be construed as a determination by the Commission that any such Arrangement does or does not violate this Order or any law enforced by the Commission.

V.

IT IS FURTHER ORDERED that Respondent Brown & Toland shall:

- A. Within thirty (30) days after the date this Order becomes final:
1. send by first-class mail, with delivery confirmation, a copy of this Order and the Complaint to each physician who participates, or has participated, in Respondent Brown & Toland since January 1, 2001;
 2. send by first-class mail, return receipt requested, a copy of this Order and the Complaint to each of its officers, directors, managers, and employees who had any responsibility regarding Respondent Brown & Toland's PPO network;

3. send by first class mail, return receipt requested, a copy of this Order, the Complaint, and the letter, attached as Exhibit A, to the chief executive officer of each payor with whom Respondent Brown & Toland has been in contact since January 1, 2001, regarding contracting for the provision of physician services, except for those contacts regarding contracts under which Respondent Brown & Toland is, or will be, paid a capitated (per member per month) rate by the payor; *provided, however*, that a copy of Exhibit A need not be included in mailings to those payors with whom Respondent Brown & Toland has not entered into or renewed (including any automatic renewal of) a contract since January 1, 2001;
- B. Terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor, except those contracts under which Respondent Brown & Toland is paid a capitated (per member per month) rate by the payor for the provision of physician services, at the earlier of:
1. receipt by Respondent Brown & Toland of a written request from a payor to terminate such contract; or
 2. the earliest termination date, renewal date (including any automatic renewal date), or anniversary date of such contract, unless the payor provides Respondent Brown & Toland with written affirmation of the contract prior to such termination date, renewal date, or anniversary date and Respondent Brown & Toland has determined not to exercise any right to terminate under the terms of the contract;
- C. Within ten (10) days from receiving a written request from a payor to terminate, pursuant to Paragraph V.B. of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each physician who participates in Respondent Brown & Toland, except for those physicians who participate only in contracts under which Respondent Brown & Toland is, or will be, paid a capitated (per member per month) rate by the payor; and
- D. For a period of five (5) years after the date this Order becomes final:
1. distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
 - a. each physician who begins participating in Respondent Brown & Toland for the provision of physician services, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that such participation begins;
 - b. each payor that contacts Respondent Brown & Toland regarding the provision of physician services, except for those contacts regarding contracts under which Respondent Brown & Toland will be paid a

capitated (per member per month) rate by the payor, and who did not previously receive a copy of this Order and the Complaint from Respondent Brown & Toland, within thirty (30) days of such contact; and

- c. each person who becomes an officer, director, manager, or employee, with any responsibility regarding a PPO network, of Respondent Brown & Toland, and who did not previously receive a copy of this Order and the Complaint from Respondent Brown & Toland, within thirty (30) days of the time that he or she assumes such status with Respondent Brown & Toland;
- 2. notify the Commission at least thirty (30) days prior to any proposed change in Respondent Brown & Toland, such as change of address, assignment, sale resulting in the emergence of a successor, or any other change in Respondent Brown & Toland that may affect compliance obligations arising out of this Order; and
- E. For a period of five (5) years after the date this Order becomes final, maintain on Respondent Brown & Toland's website a copy of this Order and the accompanying Complaint, with such prominence and identification as is given to regularly featured articles; and
- F. Publish in the first official annual report after the date this Order becomes final, a copy of this Order and the accompanying Complaint, and in each subsequent annual report, for five (5) years after the date this Order becomes final, a description of this matter and a link to the copy of this Order and the accompanying Complaint maintained on Respondent Brown & Toland's website.

VI.

IT IS FURTHER ORDERED that Respondent Brown & Toland shall file verified written reports within sixty (60) days after the date this Order becomes final, and annually thereafter for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require, setting forth:

- A. In detail, the manner and form in which Respondent Brown & Toland has complied and is complying with this Order;
- B. The name, address, and telephone number of each payor with which Respondent Brown & Toland has had any contact regarding the provision of physician services, except for those contacts regarding contracts under which Respondent Brown & Toland will be paid a capitated (per member per month) rate by the payor;

- C. Copies of the delivery confirmations required by Paragraph V.A.1 of this Order; and
- D. Copies of the signed return receipts required by Paragraph V.A.2 & 3, C and D.1.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent Brown & Toland shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in its possession, or under its control, relating to any matter contained in this Order; and
- B. Upon five (5) days' notice to Respondent Brown & Toland, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of Respondent Brown & Toland.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date it becomes final.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: