

Complaint

IN THE MATTER OF

CALIFORNIA PACIFIC MEDICAL GROUP, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9306; File No. 0210143

Complaint, July 8, 2003--Decision, May 10, 2004

This consent order addresses practices used by Respondent California Pacific Medical Group, Inc., doing business as Brown and Toland Medical Group, an independent physician practice association (“IPA”) doing business both as a risk-sharing IPA in its contracts with health maintenance organizations (“HMO”) and as a non-risk-sharing IPA in its contracts to provide a preferred physician network (“PPO”) to payors. Its PPO members include approximately 600 physicians who provide physician services in San Francisco to PPO enrollees who live or work in San Francisco, California. The order, among other things, prohibits the respondent from entering into or facilitating any agreement between or among any physicians practicing in the Unifour area (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the respondent. The order also prohibits the respondent from exchanging or facilitating the 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 physicians is willing to deal, and from attempting to engage in – or encouraging, suggesting, advising, pressuring, inducing, or attempting to induce anyone to engage in – any action prohibited by the order. In addition, the order requires the respondent, for five years after the order becomes final, to notify the Commission at least sixty days prior to entering into any arrangement with physicians -- under which the respondent would act as a messenger or agent on behalf of any physician for any qualified risk-sharing joint arrangement with payors regarding contracts or the terms of dealing with the physicians and payors -- and at least sixty days prior to negotiating or entering into any agreement with payors regarding contracts or the terms of dealing on behalf of any physician in a clinically-integrated joint arrangement. The order also requires the respondent to terminate, without penalty, any payor contracts that it had entered into during the period at issue, at any such payor’s request.

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Participants

For the Commission: *John Wiegand, Sylvia Kundig, Gwen Fanger, Norris Washington, Lauren Kearney, Pamela Timus, Jeffrey A. Klurfeld, Jerome Swindell, Anne R. Schenof, Daniel P. Ducore, D. Bruce Hoffman, Thomas R. Iosso, and Mary Coleman.*

For the Respondent: *Janet E. Shestakov, General Counsel, California Pacific Medical Group, Inc., and Richard A. Feinstein, Boies, Schiller & Flexner, LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.* (“FTC Act”), and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that California Pacific Medical Group, Inc., dba Brown and Toland Medical Group (“Brown & Toland”), has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

NATURE OF THE CASE

1. This matter concerns a horizontal agreement organized by Brown & Toland among competing physicians to agree collectively on the prices and other competitively significant terms on which they would enter into contracts with health plans or other third-party payors (“payors”). In furtherance of this illegal agreement, Brown & Toland directed its physicians to terminate pre-existing contracts with payors. Brown & Toland also approached other physician organizations and invited them to enter into horizontal agreements regarding prices or other elements of competition. Brown & Toland’s conduct had the purpose and effect of raising prices for physician services in San Francisco, California.

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RESPONDENT

2. Brown & Toland is a for profit corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business

located at 100 Van Ness Avenue, 28th Floor, San Francisco, California 94102.

JURISDICTION

3. The general business practices of Brown & Toland, including the acts and practices alleged herein, are in commerce or affect commerce as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. At all times relevant to this Complaint, members of Brown & Toland were physicians engaged in the business of providing health care services for a fee. Except to the extent that competition has been restrained as alleged herein, members of Brown & Toland have been, and are now, in competition with each other for the provision of physician services.

BACKGROUND

5. Physicians often enter into contracts with payors that establish the terms and conditions, including fees and other competitively significant terms, for providing health care services to enrollees of payors. Payors may also develop and sell access to networks of physicians. Such payors include, but are not limited to, health maintenance organizations (“HMOs”) and preferred provider organizations (“PPOs”). Physicians entering into such contracts often agree to reductions in their compensation to obtain access to additional patients made available by the payors’ relationship with the enrollees. These contracts may reduce the payors’ costs and permit them to lower medical care costs, including the price of health insurance and out-of-pocket medical care expenditures, for enrollees.

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6. Physicians organize their practices under several models, including but not limited to, sole proprietorships, partnerships, and professional corporations (collectively “physician entities”). Absent agreements among competing physician entities on the terms on which they will provide services to the enrollees of payors, competing physician entities decide unilaterally whether to enter into contracts with payors to provide services to the payor’s enrollees, and on what prices and other terms and conditions they will accept under such contracts.

7. Physician entities often are paid for the services they provide to health plan enrollees either by contracting directly with a health plan or indirectly by participating in independent practice associations (“IPAs”). Some physician entities participating in IPAs share the risk of financial loss with other participants if the total costs of services provided to health plan enrollees exceed anticipated levels (“risk-sharing IPA”). Physicians participating in a risk-sharing IPA also typically agree to follow guidelines relating to quality assurance, utilization review, and administrative efficiency.

8. In order to be competitive in the San Francisco metropolitan area, a payor’s health plan should include in its physician network a large number of primary care physicians and specialists who practice in San Francisco. A substantial number of the primary care physicians and specialists who practice in San Francisco are members of Brown & Toland.

FORMATION OF BROWN & TOLAND’S PPO NETWORK

9. Brown & Toland is a risk-sharing IPA in its contracts with HMOs to provide services to HMO enrollees who live or work in San Francisco, California. Approximately 1,500 physicians who provide physician services in San Francisco participate in, or have contracts with, Brown & Toland to provide services to the HMO enrollees under Brown & Toland’s contracts with HMOs.

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10. Beginning in 2000, Brown & Toland observed that its revenues from HMOs were declining. Brown & Toland believed this was, in part, the consequence of HMO enrollees switching to other types of health plans, such as PPOs, for the payment of physician fees and other medical costs. To capture revenue from the PPO market segment, Brown & Toland formed a PPO physician network. The Brown & Toland PPO network comprises approximately one-third of the Brown & Toland HMO physician members.

11. Brown & Toland PPO network physicians provide services to PPO enrollees on a fee-for-service basis. To receive compensation for services, the PPO network physicians directly bill, and get paid by, the PPO enrollee or the PPO payor. The Brown & Toland PPO network physicians do not share financial risk in connection with the provision of services to PPO enrollees.

12. The Brown & Toland PPO network physicians have not integrated their practices through the PPO network in any significant respect. To the extent that the Brown & Toland physicians may have achieved clinical efficiencies regarding the provision of services under Brown & Toland's risk-sharing contracts, Brown & Toland has no ongoing mechanism to ensure that those potential efficiencies are replicated in services provided by its PPO network. Brown & Toland does not monitor practice patterns and quality of care, or enforce utilization standards regarding services provided by its PPO network. Brown & Toland's PPO network physicians are required to abide by the utilization management guidelines established by payors, not by Brown & Toland's risk-sharing contracts, and, as more fully alleged below, it negotiates fees for its PPO network physicians that are different from the fee schedules Brown & Toland employs for its risk-sharing contracts.

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**THE PPO NETWORK'S JOINT AGREEMENTS ON
PRICES AND TERMS**

13. Brown & Toland formed the PPO network to promote, among other things, the collective economic interests of the PPO network physicians by increasing their negotiating leverage with health plans. In connection with the formation of its PPO network, Brown & Toland organized meetings among its physician members to agree upon the financial and other competitively significant contractual terms the physicians would like Brown & Toland to achieve on their behalf. Brown & Toland represented to its physician members that the activities in which they were engaging were legal.

14. When Brown & Toland solicited physicians to join its PPO network, it provided them with at least two fee schedules from which to choose (collectively "Brown & Toland fee schedules"). Brown & Toland represented to prospective PPO network physicians that the Brown & Toland fee schedules represented appropriate compensation for physicians providing services to PPO enrollees in San Francisco. Brown & Toland informed the physicians that by choosing one of the Brown & Toland fee schedules, the physician would be agreeing to be a PPO network physician for fees at or above the specified rate. Brown & Toland also informed its physicians that it is usually a prudent business practice to choose a higher fee schedule. Both Brown & Toland fee schedules generally represented a significant increase over the rates that physicians were currently receiving for services provided to PPO enrollees.

15. When physicians joined Brown & Toland's PPO network they chose the Brown & Toland fee schedule under which they wanted to be paid. When Brown & Toland negotiated contracts with payors on behalf of its PPO network physicians, it presented a collective rate to payors.

16. Brown & Toland's PPO network physicians agreed with Brown & Toland to refuse to contract individually, or through an

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agent, with any payor with which Brown & Toland was negotiating. Under the provider agreement that Brown & Toland had its PPO network physicians sign, the physicians also are prohibited from contracting with any payor for less than the Brown & Toland fee schedule that the physician chose.

17. After Brown & Toland formed its PPO network, it began negotiating contracts with health plans on behalf of the physicians in its PPO network. At times, when Brown & Toland believed the negotiations were proceeding unfavorably, it directed the physicians in its PPO network to cancel individual contracts the physicians may have had with the health plan. Most of the PPO network physicians, when directed, did in fact terminate individual contracts. Brown & Toland collected the physician termination letters and forwarded them to the payors. The purpose of the collective terminations was to increase Brown & Toland's negotiating leverage to obtain higher fees and other favorable competitively significant terms for physician services.

**ATTEMPTS TO INDUCE COMPETING PHYSICIAN
GROUPS TO JOIN IN BROWN & TOLAND'S
COLLECTIVE NEGOTIATION**

18. During Brown & Toland's negotiations with at least one payor, Brown & Toland learned that the payor was simultaneously using a competing IPA to obtain contracts for the competing IPA's member physicians. Brown & Toland further learned that the contract many members of the competing IPA were likely to accept provided for lower fees for physician services than the contract that Brown & Toland was trying to negotiate with that payor.

19. Brown & Toland contacted the IPA referenced in Paragraph 18 and invited that IPA to work with Brown & Toland to devise a strategy whereby Brown & Toland and the other IPA would not compete on price or other elements or terms of competition.

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20. Brown & Toland also contacted other competing IPAs and integrated medical groups and offered to negotiate with payors on behalf of those competitors or their member physicians for fee-for-service contracts at collectively determined rates.

ANTICOMPETITIVE EFFECTS

21. As a consequence of Brown & Toland's conduct, payors agreed, among other things, to compensate Brown & Toland PPO

network physicians at a higher rate than they would have compensated them absent the conduct.

22. The purpose, effects, tendency, or capacity of the conduct are, and have been, to restrain trade unreasonably and hinder competition in the provision of physician services in San Francisco, California, in the following ways, among others:

A. Price and other forms of competition among Brown & Toland's PPO network physicians have been unreasonably restrained;

B. Prices for physician services have increased; and

C. Health plans, employers, and consumers have been deprived of the benefits of competition in the purchase of physician services.

23. Brown & Toland's joint negotiations on price and other competitively significant terms for PPO contracts were not reasonably necessary to achieve potential clinical efficiencies for Brown & Toland's PPO network, nor to achieve or to maintain any clinical efficiencies which Brown & Toland's PPO network members may have realized as a consequence of participating in Brown & Toland's risk-sharing HMO products.

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**VIOLATION OF THE FEDERAL TRADE COMMISSION
ACT**

24. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act. These acts and practices, or their effects, will continue or recur in the absence of the requested relief.

NOTICE

Notice is hereby given to the Respondent that the eighth day of October, 2003, at 10:00 a.m., or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the FTC Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded to you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which

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the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under § 3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a Respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a Respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that Respondent California Pacific Medical Group, Inc., dba Brown and Toland Medical Group ("Brown & Toland") is in violation of Section 5 of the FTC Act as alleged in the complaint, the Commission may order

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such relief as is supported by the record and is necessary and appropriate, including, but not limited to:

1. An order to cease and desist from entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians: (a) to negotiate on behalf of any physician with any payor; (b) to deal, refuse to deal, or threaten to refuse to deal with any payor; (c) 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 (d) not to deal individually with any payor, or not to deal with any payor through any arrangement other than Brown & Toland.
2. An order to cease and desist from 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.
3. An order to cease and desist from attempting to engage in any action prohibited by Paragraphs 1 or 2, above.
4. An order to cease and desist from encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs 1-3, above.
5. A requirement that, for a period of five (5) years, Brown & Toland notify the Commission prior to entering into any arrangement with any physicians under which Brown & Toland would act as a messenger or as an agent, on behalf of any physicians, regarding contracts with payors concerning the provision of physician services, except for those contracts under which Brown & Toland is, or will be, paid a capitated (per member per month) rate by the payor.

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6. An order requiring Brown & Toland to terminate any contract, in compliance with any applicable laws of the State of California, which it has entered into with any payor since January 1, 2001, except for those contracts under which Brown & Toland is, or will be, paid a capitated (per member per month) rate.
7. An order to cease and desist from engaging in, attempting to engage in, or encouraging others to engage in illegal horizontal agreements with competitors.
8. Any other provision appropriate to correct or remedy the anticompetitive practices engaged in by Brown & Toland.
9. A requirement that Brown & Toland distribute a copy of the Order and Complaint, within thirty (30) days after the Order becomes final, to: (a) each physician who is participating, or has participated, in Brown & Toland since January 1, 2001; (b) each officer, director, manager, and employee who had any responsibility regarding Brown & Toland's PPO network; (c) each payor whom Brown & Toland has contacted, or been contacted by, since January 1, 2001, regarding contracting for the provision of physician services, except for those contracts under which Brown & Toland is, or will be, paid a capitated (per member per month) rate by the payor.
10. A requirement that for five (5) years after the Order becomes final, Brown & Toland must distribute a copy of the Order and Complaint to: (a) each newly participating physician in Brown & Toland for the provision of physician services; (b) each person who becomes an officer, director, manager, or an employee with any responsibility regarding a PPO network of Brown & Toland; and (c) each payor whom Brown & Toland contacts, or is contacted by, regarding the provision of physician services, except for those contracts under which Brown & Toland is, or will be, paid a capitated (per member per month) rate by the payor.

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11. A requirement that for five (5) years after the Order becomes final, Brown & Toland must annually publish in any official annual report or newsletter sent to all physicians who participate in Respondent Brown & Toland, and on Brown & Toland's website, a copy of the Order and the accompanying Complaint, with such prominence and identification as is given to regularly featured articles.
12. Requirements that periodic compliance reports be filed with the Commission by Brown & Toland, and that it notify the Commission of any changes that may affect compliance obligations.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of July, 2003, issues its complaint against Brown & Toland.

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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, and having carefully considered the comments received from interested persons, 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

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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

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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,

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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;

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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

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& 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.

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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

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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

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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

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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

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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

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- 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 on May 10, 2024.

Analysis

**Analysis of Agreement Containing Consent Orders to Aid
Public Comment**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with California Pacific Medical Group, Inc., dba Brown and Toland Medical Group (“Brown & Toland”). The agreement settles charges that Brown & Toland’s preferred provider organization (“PPO”) physician network violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by facilitating and implementing agreements among Brown & Toland members on price and other competitively significant terms; refusing to deal with payors except on collectively agreed-upon terms; and negotiating uniform fees and other competitively significant terms in payor contracts and refusing to submit to members payor offers that do not conform to Brown & Toland’s standards for contracts.

The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final. The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Brown & Toland that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Commission issued its complaint and notice of contemplated relief in this matter on July, 8, 2003, and the matter was assigned to the agency’s Chief Administrative Law Judge, Stephen J. McGuire. During discovery, complaint counsel and counsel for respondent executed a proposed consent agreement. On December 30, 2003, this matter was withdrawn from litigation

Analysis

so that the Commission could consider the proposed consent agreement.

The Complaint

As alleged in the Commission's complaint, Brown & Toland is a risk-sharing independent practice association ("IPA") in its contracts with health maintenance organizations ("HMOs") to provide services to HMO enrollees who live or work in San Francisco, California. Approximately 1,500 physicians who provide physician services in San Francisco participate in, or have contracts with, Brown & Toland to provide services to the HMO enrollees under Brown & Toland's contracts with HMOs.

Physicians often enter into contracts with payors that establish the terms and conditions, including fees and other competitively significant terms, for providing health care services to enrollees of payors. Payors may also develop and sell access to networks of physicians. Such payors include, but are not limited to, HMOs and PPOs. Physicians entering into such contracts often agree to reductions in their compensation to obtain access to additional patients made available by the payors' relationship with the enrollees. These contracts may reduce the payors' costs and permit them to lower medical care costs, including the price of health insurance and out-of-pocket medical care expenditures, for enrollees.

Absent agreements among competing physician entities on the terms on which they will provide services to the enrollees of payors, competing physician entities decide unilaterally whether to enter into contracts with payors to provide services to the payor's enrollees, and what prices and other terms and conditions they will accept under such contracts.

Physician entities often are paid for the services they provide to health plan enrollees either by contracting directly with a health plan or indirectly by participating in IPAs. Some physician entities participating in IPAs share the risk of financial loss with

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other participants if the total costs of services provided to health plan enrollees exceed anticipated levels (“risk-sharing IPA”). Physicians participating in a risk-sharing IPA also typically agree to follow guidelines relating to quality assurance, utilization review, and administrative efficiency.

In order to be competitive in the San Francisco metropolitan area, a payor’s health plan should include in its physician network a large number of primary care physicians and specialists who practice in San Francisco. A substantial number of the primary care physicians and specialists who practice in San Francisco are members of Brown & Toland.

In 2001, Brown & Toland formed a PPO physician network to capture revenue from the PPO market segment. The Brown & Toland PPO network comprises approximately one-third of the Brown & Toland HMO physician members. These PPO network physicians do not share financial risk in connection with the provision of services to PPO patients. Rather, the Brown & Toland PPO network physicians provide services to PPO enrollees on a fee-for-service basis. To receive compensation for services, the PPO network physicians directly bill, and get paid by, the PPO enrollee or the PPO payor.

In addition to the lack of financial risk sharing by the PPO network physicians, the Brown & Toland PPO network lacks any significant degree of clinical integration. To the extent that the Brown & Toland physicians may have achieved clinical efficiencies regarding the provision of services under Brown & Toland’s risk-sharing contracts, Brown & Toland has no ongoing mechanism to ensure that those potential efficiencies are replicated in services provided by its PPO network. Brown & Toland does not monitor practice patterns and quality of care, or enforce utilization standards regarding services provided by its PPO network. Brown & Toland’s PPO network physicians are required to abide by the utilization management guidelines established by payors, not by the guidelines in Brown & Toland’s risk-sharing contracts. Brown & Toland also negotiates fees for

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its PPO network physicians that are different from the fee schedules Brown & Toland employs for its risk-sharing contracts.

Brown & Toland formed the PPO network to promote, among other things, the collective economic interests of the PPO network physicians by increasing their negotiating leverage with health plans. In connection with the formation of its PPO network, Brown & Toland organized meetings among its physician members to agree upon the financial and other competitively significant contractual terms the physicians would like Brown & Toland to achieve for them.

Brown & Toland presented physicians with a choice of two fee schedules when it solicited physicians to join the PPO network. Brown & Toland informed the physicians that by choosing one of the Brown & Toland fee schedules, the physician would be agreeing to be a PPO network physician for fees at or above the specified rate. Both Brown & Toland fee schedules generally represented a significant increase over the rates that physicians were currently receiving for services provided to PPO enrollees.

Once physicians joined the Brown & Toland PPO network and chose a fee schedule, Brown & Toland then began negotiating contracts with health plans on behalf of its PPO physicians. Brown & Toland presented the collective rates to the health plans. To further the contracting efforts, Brown & Toland's PPO network physicians agreed with Brown & Toland to refuse to contract individually, or through an agent, with any payor with which Brown & Toland was negotiating. Under the provider agreement that Brown & Toland's PPO network physicians signed, the physicians also were prohibited from contracting with any payor for less than the Brown & Toland fee schedule that the physician chose.

Brown & Toland directed the physicians in its PPO network to cancel individual contracts the physicians may have had with the health plan when it believed the negotiations were proceeding unfavorably. Most of the PPO network physicians, when directed,

Analysis

did in fact terminate individual contracts. The purpose of the collective terminations was to increase Brown & Toland's negotiating leverage to obtain higher fees and other favorable competitively significant terms for physician services.

Brown & Toland also attempted to devise a strategy where Brown & Toland and another San Francisco IPA would not compete on price or other elements or terms of competition. Brown & Toland contacted this IPA when it learned that the IPA was simultaneously negotiating with at least one payor for rates that were lower than Brown & Toland's PPO rates.

The complaint alleges that as a consequence of Brown & Toland's conduct, payors agreed, among other things, to compensate Brown & Toland PPO network physicians at a higher rate than they would have compensated them absent the conduct. Accordingly, Brown & Toland's acts and practices have restrained trade unreasonably and hindered competition in the provision of physician services in San Francisco, California, in the following ways, among others: price and other forms of competition among Brown & Toland's PPO network physicians were unreasonably restrained; prices for physician services increased; and health plans, employers, and consumers were deprived of the benefits of competition in the purchase of physician services.

Further, the complaint alleges that Brown & Toland's joint negotiations on price and other competitively significant terms for PPO contracts were not reasonably necessary to achieve potential clinical efficiencies for Brown & Toland's PPO network, nor to achieve or to maintain any clinical efficiencies which Brown & Toland's PPO network members may have realized as a consequence of participating in Brown & Toland's risk-sharing HMO products.

Thus, Brown & Toland's conduct has harmed patients and other purchasers of medical services by increasing the price of physician services.

Analysis

The Proposed Consent Order

The proposed consent order is designed to prevent the continuance and recurrence of the illegal concerted actions alleged in the complaint while allowing Brown & Toland and its members to engage in legitimate joint conduct.

Paragraph II.A prohibits Brown & Toland from entering into or facilitating agreements among 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 Brown & Toland.

Paragraph II.B prohibits Brown & Toland from exchanging or facilitating the 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 physicians is willing to deal.

Paragraph II.C prohibits Brown & Toland from attempting to engage in any action prohibited by paragraph II.A or II.B. Paragraph II.D prohibits Brown & Toland from 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.

Paragraph II contains a proviso that allows Brown & Toland to engage in conduct that is reasonably necessary to the formation or operation of a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." Paragraph II concludes with a provision that Brown & Toland has the burden of proof to demonstrate that the conduct that would otherwise be prohibited is reasonably necessary to the qualified joint arrangement.

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Paragraph III requires Brown & Toland, for a period of five years after the order becomes final, to notify the Commission at least sixty days prior to entering into any arrangement with physicians under which Brown & Toland would act as a messenger or agent on behalf of any physicians for any qualified risk-sharing joint arrangement with payors regarding contracts or the terms of dealing with the physicians and payors. This provision will allow the Commission to review any future Brown & Toland policy or practice that Brown & Toland plans to implement with payors before it implements such a policy or practice with respect to any particular payor.

Paragraph IV requires Brown & Toland, for a period of five years after the order becomes final, to notify the Commission prior to negotiating or entering into any agreement relating to price or other terms of dealing with any payor on behalf of any physician in a Brown & Toland qualified clinically-integrated joint arrangement. Under this provision, Brown & Toland may be required to submit various types of information relevant to an assessment of whether the arrangement is likely to be anticompetitive.

Paragraph V.A requires Brown & Toland to distribute copies of the complaint and order to its past and present members, its officers, directors, managers, and employees who had any responsibility regarding Brown & Toland's PPO network, and all payors with whom it has been in contact, since January 1, 2001, regarding contracting for the provision of physician services, other than those under which it is paid a capitated (per member per month) rate by the payor.

Paragraph V.B requires Brown & Toland to terminate, without penalty, any payor contracts that it had entered into during the collusive period, at any such payor's request. This provision intends to eliminate the effects of Brown & Toland's joint, price setting behavior. Paragraph V.C requires Brown & Toland to send a copy of any payor's request for termination to each physician who participates in Brown & Toland, except for those

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physicians who participate only in contracts under which Brown & Toland is paid a capitated (per member per month) rate by the payor.

Paragraphs V.D-V.F require Brown & Toland, for a period of five years after the order becomes final, to make the existence of the complaint and order known through several methods. Brown & Toland must distribute copies of the complaint and order to each physician who subsequently begins participating in Brown & Toland, each payor who subsequently contacts Brown & Toland regarding the provision of physicians services, except for those contacts regarding contracts under which Brown & Toland is paid a capitated (per member per month) rate by the payor, and each person who subsequently becomes an officer, director, manager, or employee of Brown & Toland with any responsibility regarding a PPO network. Brown & Toland must also maintain copies of the complaint and order on its website for five years after the order becomes final and publish, for five years after the order becomes final, copies of the complaint and order in each annual report.

The remaining provisions of the proposed order impose reporting and compliance-related requirements. Paragraph VI requires Brown & Toland to file periodic reports with the Commission detailing how it has complied with the order. Paragraph VII authorizes Commission staff to obtain access to Brown & Toland's records and officers, directors, or employees for the purpose of determining or securing compliance with the order. Paragraph VIII mandates that the order shall terminate twenty years from the date it becomes final.

Complaint

IN THE MATTER OF

**MTS, INC., d/b/a TOWER RECORDS/BOOKS/VIDEO, ET
AL.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4110; File No. 0323209
Complaint, May 28, 2004--Decision, May 28, 2004*

This consent order addresses the manner in which Respondents MTS, Inc., doing business as Tower Records/Books/Video, and Tower Direct, LLC – (“Tower”) – which together sell music and video recordings, books, and other entertainment products through retail stores and their Web site, TowerRecords.com.– handle the security of personal information collected online through their online store. The order, among other things, prohibits Tower – in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service – from misrepresenting the extent to which it maintains and protects the privacy, confidentiality, or security of any personal information collected from or about consumers. The order also requires Tower to establish and maintain a comprehensive information security program in writing that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. In addition, the order requires Tower to obtain, within one year and on a biannual basis thereafter for ten (10) years, an assessment and report from a qualified, objective, independent third-party professional, certifying that (1) Tower has in place a security program that provides protections that meet or exceed the protections required by this order, and (2) Tower’s security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers’ personal information has been protected.

Participants

For the Commission: *Laura Mazzarella, James Silver, Jessica L. Rich, and Joel Winston.*

For the Respondents: *Alan R. Malasky, Porter Wright Morris & Arthur LLP.*