ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT
In the Matter of California Pacific Medical Group, Inc., doing business as Brown and Toland Medical Group, Docket No. 9306

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 On December 30, 2003, this matter was withdrawn from litigation so that the Commission could consider the proposed consent agreement.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 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 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

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.

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.

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 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.