

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

COMMISSIONERS:

**Timothy J. Muris, Chairman
Sheila F. Anthony
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary**

In the Matter of)	
)	
CALIFORNIA PACIFIC MEDICAL GROUP, INC., dba BROWN AND TOLAND MEDICAL GROUP,)	DOCKET NO. 9306
)	
a corporation.)	
)	

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.

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.

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.

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.

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 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.

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.

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 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 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.
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.
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.

By the Commission.

Donald S. Clark
Secretary

SEAL: